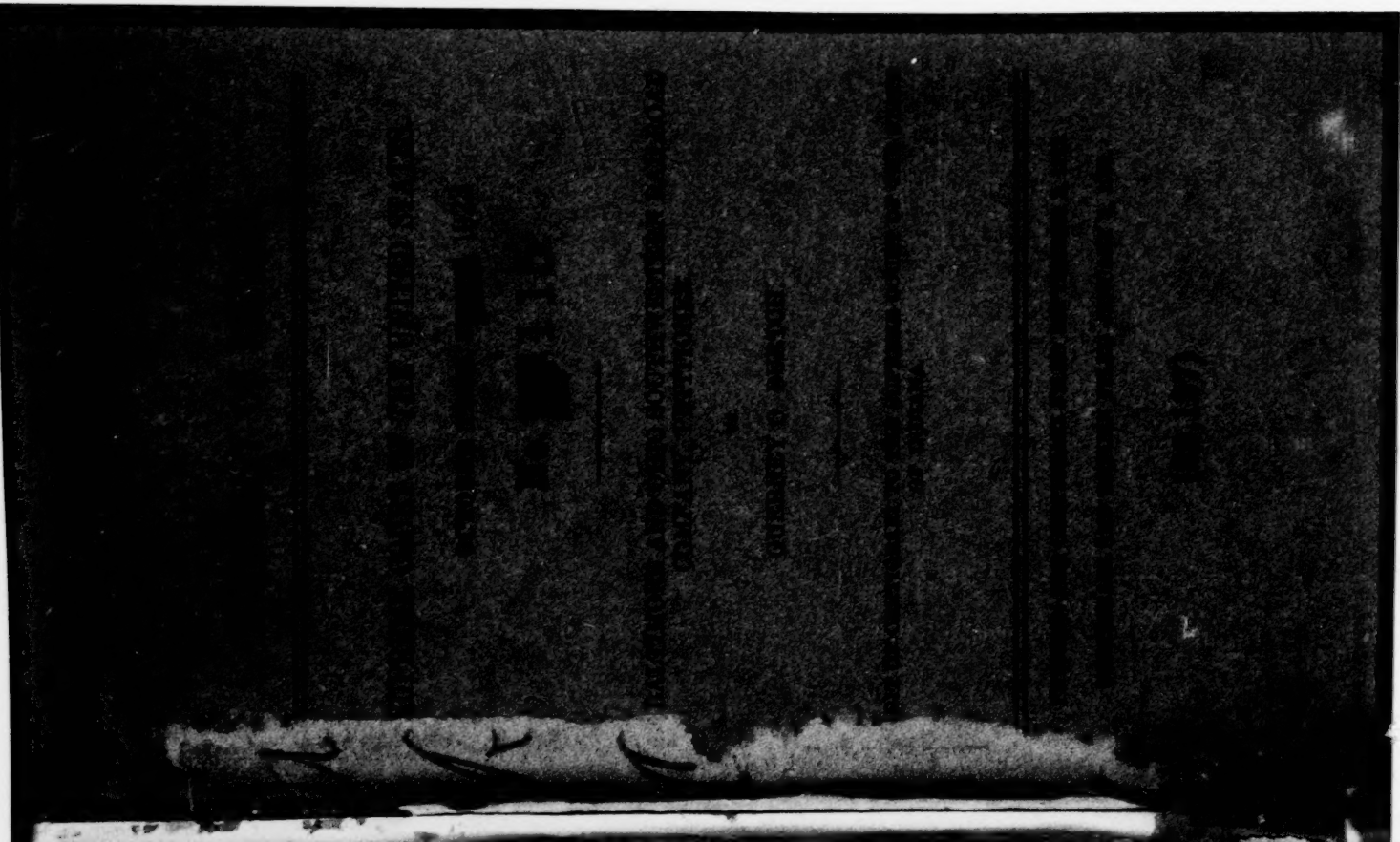

(29,127)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 577.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

GUERNEY O. BURTCH.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1922.

1 No. 23536.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD CO.

vs.

GUERNEY O. BURTCH.

Appealed from Jackson Circuit Court.

2 STATE OF INDIANA:

In the Supreme Court.

Be it remembered That heretofore to wit: On the 17th day of January, 1919, the same being the 47th Judicial day of the November Term 1918, of said Supreme Court, the Baltimore and Ohio Southwestern Railroad Company, by its attorneys McMullen and McMullen, filed in the office of the Clerk of said Supreme Court of said State of Indiana, a transcript of the record and proceedings had in the Jackson Circuit Court of said state of Indiana, in a cause wherein the Baltimore and Ohio Southwestern Railroad Company was appellant, and Guerney O. Burtch was appellee, together with an assignment of errors by appellant and its appeal bond, which said transcript was filed as a term time appeal, and *are* in the words and figures following, to wit:

3 #7716.

GUERNEY O. BURTCH

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Be it remembered that on the 20th day of February 1918, the same being in vacation of the Jackson Circuit Court the plaintiff by his attorney files his complaint in the office of the Clerk of the Jackson Circuit Court of Jackson County, Indiana, which complaint reads as follows:

"STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

No. —.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Complaint for Personal Injuries.

Demand $30,000.00.

Par. I.

The plaintiff, Guerney O. Burtch, complains of defendant, The Baltimore and Ohio Southwestern Railroad Company, and says: that on the 24th day of October 1917, defendant was, has since been, and still is a corporation, duly organized under the laws of the State of Indiana, and engaged in operating a steam railroad in said state and in and through Jackson, Jennings and other counties therein, and during all said time had in its employ and engaged in its said business more than five persons; that the town of Commiskey in said county of Jennings was on the date first named a station
4 on the line of defendant's said railroad, where it maintained a depot and platform on the west side of its main track and a side track East of the main track and a stub switch or loading track East of said side track; that on said date a local freight train, operated by defendant, and in charge of one Ed. Jackson, who was then and there in defendant's employ as conductor, arrived at said station, carrying a machine known as an ensilage cutter, which defendant had theretofore received to be transported by it to said station and delivered to certain consignees; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it was transported, and that said machine was very heavy, and with its crating and attachments weighed about 2,000 pounds; that defendant had in its employ upon said train three other persons as brakemen, and no more, whose duty it was to assist said Jackson in the handling of freight, and said conductor and brakemen were unable to unload said machine safely by reason of its great weight, and defendant had carelessly and negligently failed and omitted to provide and furnish a force of men sufficient to unload the same, and because of that fact an emergency arose and then and there existed for the employment of additional help to unload said machine; that thereupon said Jackson as such conductor acting in line of his duty and for and on behalf of defendant requested plaintiff to assist in unloading said machine,

and under the circumstances aforesaid and in obedience to said request, and not otherwise, plaintiff accepted said employment and undertook to assist in said work; that defendant should and could have furnished and supplied strong, safe and suitable skids
5 and appliances for unloading said machine, but it carelessly and negligently failed to furnish any appliances for such use; that said machine could safely and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it was transported upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on said side track, and its said conductor in charge of said work caused two green plank- 10 or 12 feet in length to be brought from a nearby saw mill, and by means of said plank-, which were defective, weak and of insufficient strength, carelessly and negligently undertook to unload said machine from said car while on said side track over the tracks of said stub switch Eastward to the ground beyond, and carelessly and negligently failed to inspect, test or support said plank-, but negligently pronounced the same sufficient and carelessly and negligently ordered and directed said machine to be unloaded and moved from said car upon said plank-, and while said machine was being so unloaded and while plaintiff was assisting in said work as aforesaid and in the exercise of due care, one of said planks broke and said machine fell upon plaintiff and crushed his body to the ground breaking three ribs on his left side and injuring his spine and spinal cord, and bruising and injuring his flesh, muscles and nerves, whereby both his legs, his bowels and bladder and the muscles and nerves of the lower part of his body were and are permanently paralyzed, and he was made sore and sick, and from his said injuries he suffered, still
6 suffers, and in future will suffer, great physical pain and mental anguish, and he was compelled to and did incur expense in the sum of $200.00 for care, nursing, medicines and medical aid, in attempts to heal and cure said injuries, and in future will be required to expend large sums of money for such purposes; that he is a farmer, 31 years of age, married and has a wife and two children, and before receiving said injuries he was sound in body and in good health, and was able to work and earn money and support himself and family, but because of said injuries he has been confined to his home and bed and unable to work for four months, and rendered permanently unable to perform manual labor and a dependent cripple and unable to care for himself or to relieve the demands of nature without aid, all to his damage in the sum of Thirty Thousand Dollars.

That his said injuries and damages were caused solely by and the direct result of, the carelessness, negligence and omissions of duty of said defendant and its said conductor as aforesaid, and inflicted upon plaintiff while in the exercise of due care on his part.

Par. II.

The plaintiff, Guerney O. Burtch, complains of defendant, The Baltimore and Ohio Southwestern Railroad Company, and for second paragraph of complaint herein says, that on the 24th day of October 1917, defendant was, has since been and still is, a corporation, duly organized under the laws of the State of Indiana, and engaged in operating a steam railroad in said state and extending through Jackson, Jennings and other counties therein; that the town
7 of Commiskey in said county of Jennings was a station on the line of defendant's said railroad on the date first named, where it maintained a depot and platform on the West side of its main track; and a side track East of the main track, and a stub switch or loading track East of said side track; that on said date a local freight train, operated by defendant, and in charge of one Ed Jackson, who was then and there in defendant's employ as conductor, arrived at said station carrying a machine known as an ensilage cutter, which defendant had theretofore received for transportation to and delivery at said station; that plaintiff and six of his neighbors had bought said machine, and he was present upon the arrival of said train to receive said machine, and had arranged to use the same upon his farm the following day; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it had been transported, and said machine was very heavy, and with its crating and attachments weighed about 2,000 pounds; that defendant had in its employ upon said train besides said conductor, three brakemen, and no more, whose duty it was to assist said conductor in handling freight, and by reason of its great weight said conductor and brakemen were unable to unload said machine, and defendant had carelessly and negligently failed to provide and furnish a force sufficient to handle and unload said machine in safety; and that defendant could and should have furnished strong, safe and suitable skids and appliances for unloading said machine, but it had carelessly and negligently failed and omitted to furnish any appliances for such purposes; that said machine could safely and should have been unloaded upon the platform from said train while standing
8 upon the main track, but defendant carelessly and negligently failed and neglected so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it had been carried upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on its said side track, and its said conductor in charge of said work caused two green planks to be brought from a nearby saw-mill, and by means of said planks, which were weak and defective and of insufficient strength to support said machine, carelessly and negligently undertook to unload said machine from said car while on said side track over the rails of said stub switch Eastward to the ground, and carelessly and negligently failed to inspect, test or support said planks,

but carelessly pronounced the same safe and sufficient, and carelessly and negligently ordered and directed said machine to be unloaded and moved upon said plank and thence to the ground; that in these circumstances, and because of his interest in said machine plaintiff went upon the right of way of defendant and at the request and with the knowledge and consent of said conductor undertook to assist in unloading said machine, and while engaged in said work, and in the exercise of due care for his safety, one of said plank broke under the weight of said machine and said machine fell upon him and crushed his body to the ground, breaking three ribs on his left side, and injuring his spine and spinal cord, and bruising and injuring his flesh, muscles and nerves, whereby both his legs, his bowels and bladder, and the nerves and muscles of the
9 lower part of his body were and are permanently paralyzed, and he was made sore and sick, and suffered and still suffers, and in future will suffer, great physical pain and mental anguish, and he was compelled to and did incur expense in the sum of $200.00 for care, nursing, medicines and medical aid in attempts to heal and cure his said injuries, and will be required in the future to expend large sums for such purposes; that he is a farmer 31 years of age, married, and has a wife and two children, and before receiving said injuries he was sound in body and in good health, and able to work and earn money and support himself and family, but because of said injuries he has been confined to his home and bed for four months and unable to work, and rendered permanently unable to perform manual labor and a dependent cripple, and unable to care for himself and to relieve the demands of nature without aid,—all to his damage in the sum of Thirty Thousand Dollars.

That his said injuries and damages were caused solely by and are the direct result of, the carelessness and negligence and omissions of duty of said defendant, and its said conductor as above alleged, and were inflicted upon plaintiff in the exercise of due care on his part.

Wherefore plaintiff demands judgment against defendant for Thirty Thousand Dollars and for all other proper relief.

MONTGOMERY & MONTGOMERY,
Attorneys for Plaintiff."

"To the Clerk:

The plaintiff fixes March 4th, 1918 for the hearing of the within complaint and requests that summons be issued requiring defendant to appear and answer on said date.

MONTGOMERY & MONTGOMERY,
Attys. for Plf.

February 20th, 1918."

10 Pleas and proceedings had before the Honorable Oren O. Swails, Judge of the 40th Judicial Circuit of the State of Indiana and ex officio Judge of the Jackson Circuit Court, at a term of said court commencing on the 4th Monday of February, 1918, held at the court-house, in the town of Brownstown, Jackson County, Indiana.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Be it remembered, that on the 4th day of March 1918 the same being the 7th judicial day of the February Term, 1918, of said court, the following proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Comes now McMullen and McMullen and enters their appearance for the defendant.

That afterwards to-wit on the 6th day of March 1918, the same being the 9th Judicial day of said term of said court the following further proceedings were had in said cause in said court:

11 #7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the defendant files motion to require the plaintiff to separate his complaint into separate causes of action, which motion reads as follows:

"STATE OF INDIANA,
County of Jackson, ss:

In the Jackson Circuit Court, February Term, 1918.

GUERNEY O. BURTCH

VS.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause moves the court for an order requiring the plaintiff therein to separate the several causes set forth in his complaint herein and each paragraph thereof into separate paragraphs and separately number the same.

KOCHENOUR & PRINCE,
McMULLEN & McMULLEN,
Attorneys for Defendant."

12 That afterwards, to-wit, on the 8th day of March 1918 the same being the 11th Judicial day of said term of said court, the following further proceedings were had in said cause in said court:

#7716.

GUERNEY O. BURTCH

VS.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the court being sufficiently advised in the premises overrules defendant's motion to require the plaintiff to separate his complaint into separate causes of action herein, to which ruling of the court, the defendant at the time, excepts.

That afterwards, to-wit, on the 11th day of March 1918, the same being the 13th Judicial day of said term the following further proceedings were had in said cause in said court:

#7716.

GUERNEY O. BURTCH

VS.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the defendant files motion to require the plaintiff to make his complaint herein, more specific, which motion reads as follows:

13 "STATE OF INDIANA,
County of Jackson, ss:

In the Jackson Circuit Court, February Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause moves the court for an order requiring the plaintiff therein to make his complaint and each paragraph thereof more specific, definite and certain in each of the following particulars, to-wit:

1. To state what notice, if any, plaintiff had of the arrival of said ensilage cutter.

2. To state whether the shipment of said ensilage cutter constituted a car load or less than car load lots.

3. To state whether said ensilage cutter was shipped from without this state to said town of Commiskey or from a point within this state to said town.

4. To state whether said shipment was made by contract in writing or in parol.

5. If said shipment was made to this plaintiff or to him and others under a contract in writing to set forth said contract or copy thereof.

6. To give the number of men defendant furnished to unload said ensilage cutter.

14 7. To state how or in what manner and means said conductor caused said two green planks to be brought from said mill.

McMULLEN & McMULLEN,
KOCHENOUR & PRINCE,
Attorneys for Defendant."

That afterwards to-wit on the 13th day of March 1918, the same being the 15th Judicial day of said term the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the court being sufficiently advised in

the premises now overrules defendant's motion to require the plaintiff to make his complaint more specific, to which ruling of the court, the defendant, at the time, excepts.

That afterwards, to-wit on the 14th day of March 1918, the same being the 16th Judicial day of said term the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

15 Come now the parties and the defendant files demurrer and memorandum to each paragraph of plaintiff's complaint herein, which demurrer and memorandum reads as follows:

"STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause demurs to the First and Second Paragraphs of plaintiff's complaint and separately and severally to each of said paragraphs and for cause of demurrer says that said paragraph nor neither of them state facts sufficient to constitute a cause of action.

Defendant sets out his memorandum of points on demurrer.

KOCHENOUR AND PRINCE,
McMULLEN AND McMULLEN,
Attorneys for Defendant.

16 *Memoranda.*

1. Neither paragraph shows any negligence of the defendant which is approximately the cause of the alleged injury.

2. Neither paragraph shows any authority on the part of the conductor to employ, order or direct the plaintiff as alleged in the complaint.

3. Neither paragraph shows facts which show it to be within the line of duty of the conductor to employ, order or direct the plaintiff

as alleged in his complaint to do the acts alleged to — *do* in his complaint.

4. Neither paragraph shows that the ensilage cutter was an interstate shipment and said shipment was therefore governed by the Federal Act and the presumption of law is that it was shipped by virtue of a written contract and no contract or copy is set out in or attached to said complaint.

5. Neither paragraph shows that the shipment was an Inter-State shipment and is therefore governed by the Federal Act and under such conditions the law is that the complaint should show that the plaintiff did not assume the risk which he fails to do.

6. The complaint and each paragraph threof shows that the plaintiff assumed the risk and cannot recover.

17 7. Each paragraph shows this to be an Inter-State shipment governed by the classifications, tarriffs and rules filed with the Inter-State Commerce Commission and accepted by it as well as a like Commission of the State of Indiana, said regulations, rules and tariff providing that shipments of the kind mentioned in the complaint must be unloaded by the consignee of which facts the law presumes the plaintiff had notice and there is no allegation of non notice of such rules, regulations and tariffs and especially of the Special par[illegible] thereof herein mentioned.

8. Each paragraph shows that the plaintiff knew or could by the exercise of reasonable care have known of the alleged defect in said timbers mentioned in said complaint.

9. Each paragraph fails to show that plaintiff did not assume the risk of injury by using said planks or timbers.

10. Neither paragraph shows that the plaintiff was free from contributory negligence."

18 That afterwards to-wit, on the 18th day of March 1918, the the same being the 19th Judicial day of said term, the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the court being sufficiently advised in the premises, overrules demurrer to each paragraph of plaintiff's complaint herein, to which ruling of the court the defendant, at the time, excepts.

That afterwards to-wit on the 25th day of March 1918 the same

being the 25th Judicial day of said term, the following further proceedings were had in said cause, in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the plaintiff files four interrogatories which interrogatories read as follows:

"STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

19 GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Interrogatories to Defendant.

The plaintiff submits and moves the court to require defendant through its proper officer or agent to answer under oath, each of the following interrogatories numbered from 1 to 4 inclusive, to-wit:

No. 1. Was defendant, The Baltimore and Ohio Southwestern Railroad Company, on October 24th, 1917, engaged in operating a steam railroad extending through the town of Commiskey in Jennings County, Indiana?
Answer. ——.

No. 2. Did defendant on October 24th, 1917, have in its employ and engaged in operating a railroad in this state more than five persons?
Answer. ——.

No. 3. Was one Ed Jackson, on October 24th, 1917, in defendant's employ as a train conductor?
Answer. ——.

No. 4. Was said Ed Jackson as conductor in charge of a local freight train operated by defendant through the town of Commiskey, Indiana, on October 24th, 1917?
Answer. ——.

MONTGOMERY & MONTGOMERY,
Attorneys for Plaintiff."

20 and the defendant is ruled to answer said interrogatories.

And now by agreement of parties, examination of the plaintiff at the office of Montgomery & Montgomery at Seymour, Indiana, at one thirty P. M. on March 30th, 1918.

The defendant files answer in two paragraphs which answer reads as follows:

"STATE OF INDIANA,
County of Jackson, ss:

In the Jackson Circuit Court, March Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

First Paragraph.

The defendant in the above entitled cause for answer to the plaintiff's complaint herein says it denies each and every allegation therein made.

Second Paragraph.

For further and second paragraph of answer to plaintiff's complaint herein and each paragraph thereof the defendant says:

That the plaintiff was one of a number of persons, owners and consignees of an ensilage cutter described in the complaint herein, which had been shipped from Louisville, Kentucky to Com-
21 miskey, Indiana, a station on the line of the defendant's railroad, arriving at said last named station on the day of the injury to plaintiff as alleged in the complaint herein.

That said shipment was made between said stations over the line of defendant, on a train of defendant running between said cities and points.

That said ensilage cutter was received and shipped by defendant under and in accordance with the usual written contract in force at said time of which plaintiff had and has full knowledge.

That said ensilage cutter was carried by the defendant at less than car load ratings and was very heavy so that the same could not have been handled by the regular station and train employees and said Commiskey was a station where the unloading facilities of defendant were insufficient for handling said cutter.

That there was in force and effect on said date and long prior thereto a rule and regulation of said defendant, theretofore filed with the Indiana Public Service Commission and the Inter State Commerce Commission, providing that such freight as described in plaintiff's complaint and herein, should be unloaded by the owner or owners thereof, including this plaintiff.

That said rule and regulation was in full force and effect at the time of plaintiff's injury and of which plaintiff had full notice. That full compliance with the law requiring the giving of such

notice had been rendered by defendant long prior to said injury.

22 That said rule and regulation has at no time been invalidated, overruled or questioned by this plaintiff or any other person.

That said conductor mentioned in plaintiff's complaint had no authority or right to employ plaintiff in assisting to unload said ensilage cutter or to in any manner or degree bind the defendant by any such alleged employment.

That the plank or skid mentioned in the complaint herein was not the property of nor selected by the defendant or its employees but was selected by the owners of said ensilage cutter, including this plaintiff and — the defendant nor its employees knew of any defect in said skid or plank so selected nor had any means of such knowledge but that the plaintiff did know of such defect and had full means of knowing of the same.

That said skids, including the one alleged to be defective, was not the property of nor furnished by defendant but by the plaintiff.

Wherefore defendant prays judgment for costs and all proper relief.

KOCHENOUR & PRINCE,
McMULLEN & McMULLEN,
Attorneys for Defendant."

23 And the plaintiff is ruled to reply to second paragraph of said answer.

The plaintiff files demurrer and memorandum to the second paragraph of defendant's answer which memorandum and demurrer reads as follows:

"STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Demurrer to 2nd Paragraph.

The plaintiff demurs to the 2nd paragraph of defendant's answer herein and for cause of demurrer says that said paragraph of answer does not contain facts sufficient to constitute a cause of defense, for reasons more particularly set out in a memorandum filed herewith as a part hereof.

MONTGOMERY & MONTGOMERY,
Attorneys for Plaintiff.

24 *Memorandum.*

1. No copy of the alleged rule of defendant is set out with said paragraph of answer.

2. Said answer is a mere argumentative denial when a general denial — on file.

3. Said paragraph does not deny all the material matters in the complaint or all the acts of negligence charged.

4. All facts pleaded in said answer are admissible under the general denial filed as the 1st paragraph of answer.

25 That afterwards to-wit, on the 27th day of March 1918 the same being the 27th judicial day of said term the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the court being sufficiently advised in the permises, now sustains plaintiff's demurrer to the second paragraph of defendant's answer, to which ruling — the court, the defendant, at the time, excepts.

That afterwards, to-wit, on the 30th day of March 1918 the same being the 30th Judicial day of said term the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

This cause is now set for trial for May 27th, 1918.

26 That afterwards, to-wit, on the 9th day of May 1918 the same being the 4th Judicial day of the May Term 1918 of said court the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come again the parties and the defendant files answers to plaintiff's interrogatories herein, which answers read as follows:

(Here insert.)

Set out latter herein page 69.

27 That afterwards to-wit on the 27th day of May 1918 the same being the 19th Judicial day of said term of said court, the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the examination of the plaintiff is now published in open court and reads as follows:

(Here insert.)

28 And now this cause being at issue is called for trial, and the plaintiff demands a jury, and at the call of the Sheriff of Jackson County, Indiana comes Allan Lucas, John Summa, James B. Cross, George Hurley, Charles T. Reinbold, Clarence Eastin, John E. Keiffer, Worth Clark, Sherman Cockerham, Kirby Smith, George Darlage and James Luckey, twelve good and lawful jurors of Jackson County, Indiana, selected by the parties and who are sworn as to their qualifications, empanelled and sworn to try this cause according to law, and the evidence, and the jury having heard the opening statement of the counsel herein, and hearing a part of the evidence to be adduced, and there not being time to finish said cause, the further hearing hereof is now continued until to-morrow morning at 9 o'clock.

That afterwards, to-wit, on the 28th day of May 1918, the same being the 20th Judicial day of said term of said court the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come now the parties and the trial of this cause is now resumed with the jury as of yesterday and the jury having heard all the evidence to be adduced, and heard the argument of counsel, and
29 receiving the written instruction of the court, the jury now retires to the jury room, under charge of its sworn bailiff, to consider of its verdict; and the Clerk of this court files said written instructions so given by the court, and the court, at the request of the defendant, submits interrogatories numbered from one to thirty-nine inclusive, to be answered by the jury, and to be returnable by them, with their verdict herein.

Comes now said jury, under charge of its sworn bailiff, and returns into open court, its verdict together with their answer to said interrogatories, which verdict and interrogatories and answers thereof read as follows:

STATE OF INDIANA,
Jackson County, ss:

Jackson Circuit Court, May Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

We the jury find for the plaintiff, Guerney O. Burtch, and assess his damages at $8,000.00.

KIRBY SMITH,
Foreman.

30 One. Was Guerney O. Burtch, plaintiff, and others the owners of the ensilage cutter mentioned in the complaint at the time said Burtch received his alleged injuries?

Answer. No.

KIRBY SMITH.

Two. Did plaintiff on the day he received his alleged injuries wait at the station for the arrival of the train upon which said ensilage cutter was shipped?

Answer. No evidence.

KIRBY SMITH.

Three. Did plaintiff know said ensilage cutter was upon said train before said train arrived?
Answer. Yes.

KIRBY SMITH.

Four. What was date of plaintiff's alleged injury?
Answer. Oct. 24, 1917.

KIRBY SMITH.

Five. Did plaintiff on said date assist in unloading other freight from said train and car before said ensilage cutter was attempted to be removed therefrom?
Answer. No evidence.

KIRBY SMITH.

Six. Did plaintiff on the day he was injured as alleged assist in unloading at the station of Commiskey other freight from the same car in which said cutter was before said cutter was attempted to be removed therefrom?
Answer. No evidence.

KIRBY SMITH.

Seven. Was the car from which the ensilage was attempted to be removed a way car, that is, one which contained other freight
31 for other points than said Commiskey?
Answer. Yes.

KIRBY SMITH.

Eight. Did said car come in said train from Louisville, Kentucky to Commiskey?
Answer. Train came from Louisville. No evidence where car came from.

KIRBY SMITH.

Did said cutter come to said Commiskey in said car from Louisville, Kentucky?
Answer. No evidence.

KIRBY SMITH.

Nine. Is said Commiskey in the State of Indiana?
Answer. Yes.

KIRBY SMITH.

Ten. Was there in full force and effect at the time of plaintiff's alleged injury, an official classification of rates, rules, regulations and tariffs?
Answer. Yes.

KIRBY SMITH.

Eleven. Was the official classification of rates, rules, tariffs and

regulations that was in force and effect on the road of defendant at the time plaintiff's alleged injury known as "Official Classification No. 44"?

Answer. Yes.

KIRBY SMITH.

Twelve. Had said "Official Classification No. 44" been filed with the Public Service Commission of Indiana on December 14, 1916?

32 Answer. Yes.

KIRBY SMITH.

Thirteen. Had said "Official Classification No. 44" been filed with the Interstate Commerce Commission on December 12, 1916?

Answer. Yes.

KIRBY SMITH.

Fourteen. Was there not in full force and effect at the time plaintiff was injured and it being one of the rules and regulations included in said "Official Classification No. 44" on page 30 thereof, the following, viz:

"Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that cannot be handled by the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling?

Answer. Yes.

KIRBY SMITH.

Fifteen. Do not the letters quoted above "L. C. L." stand for the words "Less than Car Load Lots"?

Answer. Yes.

KIRBY SMITH.

Sixteen. In unloading said cutter from said car, were timbers used?

Answer. Yes.

KIRBY SMITH.

Seventeen. Were said timbers secured by plaintiff and another person from a nearby saw mill?

Answer. Yes.

KIRBY SMITH.

33 Eighteen. Who selected said timbers?

Answer. Conductor Jackson.

Nineteen. Were said timbers apparently sound and safe?

Answer. No evidence.

KIRBY SMITH.

Twenty. In unloading said cutter did one of said timbers break allowing the said cuttter to fall upon plaintiff?
Answer. Yes.

KIRBY SMITH.

Twenty-one. What part of the distance from said car had said cutter been moved toward the ground when it broke?
Answer. About two thirds.

KIRBY SMITH.

Twenty-two. Who were present when said timbers were selected?
Answer. Plaintiff, conductor Jackson and others.

KIRBY SMITH.

Twenty-three. Was there a defect in said timber which a careful inspection by those selecting the same could not have discovered?
Answer. No evidence.

KIRBY SMITH.

Twenty-four. Was the defect in said plant or timber what caused the same to break and injure plaintiff?
Answer. No evidence.

KIRBY SMITH.

Twenty-five. Did said timbers appear to a reasonably pru-
34 dent man safe and suitable for the unloading of said cutter?
Answer. Suitable to employee but not sufficiently tested by employer.

KIRBY SMITH.

Twenty-six. Was said cutter heavy?
Answer. Yes.

KIRBY SMITH.

Twenty-seven. Did plaintiff know said cutter was heavy while the same was yet in said car?
Answer. Yes.

KIRBY SMITH.

Twenty-eight. What was the size of said timbers so selected or secured by plaintiff and another? Give dimensions.
Answer. Approximately 2 inches x 6" x 12 feet.

KIRBY SMITH.

Twenty-nine. Were they freshly sawed timbers?
Answer. Yes.

KIRBY SMITH.

Thirty. Was said cutter moved by crow bars and rollers from within said car to said car door and there placed on said timbers?
Answer. Yes.

KIRBY SMITH.

Thirty-two. Was plaintiff assisting the train crew and others in moving said cutter down said timbers when he was injured?
Answer. Yes.

KIRBY SMITH.

Thirty-three. How much did said cutter weigh?
Answer. About 1,600 lbs.

KIRBY SMITH.

35 Thirty-four. Where were the conductor of said train and the train crew when plaintiff and another were gone after said timbers?
Answer. At the car.

KIRBY SMITH.

Thirty-five. Did the conductor or any member of the train crew assist in any manner in selecting said timbers?
Answer. Conductor selected said timber.

KIRBY SMITH.

Thirty-six. If you answer the last question "Yes," then state in what way or manner the conductor or any member of the train crew assisted in selecting said timbers.
Answer. By testing the timber with his weight.

KIRBY SMITH.

Thirty-seven. Was plaintiff an employee of defendant at the time he was injured?
Answer. Yes.

Thirty-eight. If plaintiff was an employee by whom and when was he employed?
Answer. October 24, 1917 by Conductor Jackson.

KIRBY SMITH.

Thirty-nine. Did not plaintiff have as good an opportunity to see, examine and know of the condition of said timbers as the defendant or any of its employees?
Answer. Yes.

KIRBY SMITH.

36 And the court having seen and enspected said verdict and interrogatories and answers thereto, orders the Clerk of this court to file the same, and now the Clerk of this court files the same as ordered.

Now before the argument of said cause the defendant submits certain interrogatories and requests the court to require the jury to answer the same which request and interrogatories are as follows, to-wit:

"STATE OF INDIANA,
County of Jackson, ss:

In the Jackson Circuit Court, May Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause moves the Court to require the jury trying the same to answer each of the following interrogatories and return the said interrogatories and answers thereto in to open Court with their general verdict in case they find a general verdict, said interrogatories being numbered from 1 to 39.

KOCHENOUR & PRINCE, AND
McMULLEN & McMULLEN,
Attorneys for Defendant."

37 "1. Was Guerney O. Burtch, plaintiff and others the owners of the ensilage cutter mentioned in the complaint at the time said Burtch received his alleged injuries?

2. Did plaintiff on the day he received his alleged injuries wait at the station for the arrival of the train upon which said ensilage cutter was shipped?

3. Did plaintiff know said ensilage cutter was upon said train before said train arrived?

4. What was the date of plaintiff's alleged injury?

5. Did plaintiff on said date assist in unloading other freight from said train and car before said ensilage cutter was attempted to be removed therefrom?

6. Did plaintiff on the day he was injured as alleged assist in unloading at the station of Commiskey other freight from the same car in which said cutter was before said cutter was attempted to be removed?

7. Was the car from which the ensilage was attempted to be removed a way car, that is, one which contained other freight for other points than said Commiskey?

38 8. Did said car come in said train from Louisville, Kentucky to Commiskey? Did said cutter come to said Commiskey in said car from Louisville, Kentucky.

9. Is said Commiskey in the State of Indiana?

10. Was there in full force and effect at the time of plaintiff's alleged injury, an official classification of rates, rules, regulations and tariffs?

11. Was the official classification of rates, rules, tariffs and regulations that was in force and effect on the road of defendant at the time plaintiff's alleged injury known as "Official Classification No. 44"?

12. Had said "Official Classification No. 44" been filed with the Public Service Commission of Indiana on December 14th, 1916?

13. Had said "Official Classification No. 44" been filed with the Interstate Commerce Commission on December 12, 1916?

14. Was there not in full force and effect at the time plaintiff was injured and it being one of the rules and regulations included in said "Official Classification No. 44" on page 30 thereof the following viz: "Owners are required to load and unload heavy or
39 bulky freight carried at L. C. L. ratings that cannot be handled by the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling"?

15. Do not the letters quoted above "L. C. L." stand for the words Less than Car Load Lots"?

16. In unloading said cutter from said car, were timbers used?

17. Were said timbers secured by plaintiff and another person from a nearby saw mill?

18. Who selected said timbers?

19. Were said timbers apparently sound and safe?

20. In unloading said cutter did one of said timbers break allowing the said cutter to fall upon plaintiff?

21. What part of the distance from said car had said cutter been moved toward the ground when it broke?

22. Who were present when said timbers were selected?

23. Was there a defect in said timber which a careful inspection by those selecting the same could not have discovered?

24. Was the defect in said plank or timber what caused the same to break and injure plaintiff?

40 25. Did said timbers appear to a reasonably prudent man safe and suitable for the unloading of said cutter?

26. Was said cutter heavy?

27. Did plaintiff know said cutter was heavy while the same was yet in said car?

28. What was the size of said timbers so selected or secured by plaintiff and another? Give dimensions.

29. Were they freshly sawed timbers?

30. Was said cutter moved by crow bars and rollers from within said car to said car door and there placed on said timbers?

32. Was plaintiff assisting the train crew and others in moving said cutter down said timbers when he was injured?

33. How much did said cutter weigh?

34. Where were the conductor of said train and the train crew when plaintiff and another were gone after said timbers?

35. Did the conductor or any member of the train crew assist in any manner in selecting said timbers?

41 36. If you answer the last question "Yes" then state in what way or manner the conductor or any member of the train crew assisted in selecting said timbers.

37. Was plaintiff an employee of defendant at the time he was injured?

38. If plaintiff was an employee by whom and when was he employed?

39. Did not plaintiff have as good an opportunity to see, examine and know of the condition of said timbers as the defendant or any of its employees?

42 Defendant also files request for written instructions, which request is as follows, to wit:

"STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant asks that the instructions in said cause be in writing and that the Court indicate before argument what instructions will be given to the end that the same may be used by counsel in said argument to jury.

KOCHENOUR & PRINCE, AND
McMULLEN AND McMULLEN,
Attorneys for Defendant."

And now at the close of the instruction of said jury, all instructions requested and all instructions given by the Court of its own motion together with the exceptions of the defendant in relation thereto indorsed thereon are by the Judge of said court filed with the Clerk of said court which instructions endorsement and notations are as follows, to wit:

"GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

43 Gentlemen of the Jury, this is what is called a civil action for damages brought by the plaintiff, Guerney O. Burtch against the defendant. The complaint is in two paragraphs and each paragraph has been read to you and will not now be given in these instructions. To each paragraph of complaint the defendant has filed answer in general denial.

No. 1.

The burden of proof is upon the plaintiff to prove by a fair preponderance of evidence all the material allegations of at least one paragraph of his complaint before he can recover thereon. By a preponderance of evidence is meant a greater weight of evidence. That is to say if all the evidence in a case tending to prove a disputed point fairly outweighs all evidence to the contrary, then such disputed point is proven by a fair preponderance of the evidence.

No. 2.

This is what is called a civil action and you are the exclusive judges of the facts proven as well as the credibility of the witnesses but it is your duty to accept the law as given you by the court in these instructions as binding and [illegible].

STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, May Term, 1918.

No. 7716.

44 GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Plaintiff's Requested Instructions.

The plaintiff, Guerney O. Burtch, now before the commencement of argument in this case, requests the court to give to the jury each of the following instructions, numbered from 1 to —, inclusive, to-wit:

No. 1. If you find that upon the arrival of defendant's local freight train at the station of Commiskey, Indiana, on October 24th, 1917, carrying the ensilage cutter, as alleged in the complaint herein, such machine was so heavy as to make it unsafe for the regular

crew upon said train and at said station in defendant's employ at the time, to attempt to unload the same and that an emergency existed authorizing the conductor to call to his aid additional assistance and if in these circumstances the conductor in charge of said train acting in the line of his duty and on behalf of defendant requested by-standers including plaintiff Guerney O. Burtch to assist in unloading said machine, and in response to said request plaintiff did undertake to assist in said work, then defendant owed to plaintiff while so engaged, the same duty of care that it owed to a laborer regularly in its employ while engaged in the same, or similar work, and plaintiff was while so working an employee of defendant's although not expecting compensation.

(Given.)

45 No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at that time defendant was engaged in operating a railroad in this state and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was so injured while employed under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said conductor and caused by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries and your verdict should be for the plaintiff.

(Given.)

No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at that time defendant had in its employ and engaged in conducting its said business in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to de-
46 fendant by the exercise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance.

(Given.)

No. 4. It is the duty of the Master or employer to furnish and provide reasonably safe and suitable tools and appliances for the use of the employee in performing his duties; and it is the duty of the master to make proper inspection to see that such tools and appliances are sound and safe for the use intended, and for any negligent failure or omission in the performance of such duty the master will be liable for damages resulting therefrom to an employe injured, without fault on his part.

(Given.)

No. 5. If you find that plaintiff had a proprietary interest in the ensilage cutter by which he was injured and came upon defend-

ant's right of way with defendant's knowledge and consent because of such interest, then he was not a trespasser, and defendant was bound to exercise ordinary care for his safety while so upon its right of way, and would be liable for any injury sustained by plaintiff because of any act of negligence or failure to use ordinary care on the part of defendant alleged in the second paragraph of plaintiff's complaint, to which plaintiff's own carelessness did not contribute.

(Given.)

47 No. 6. If you find for the plaintiff, it will then become your duty to assess his damages; and in assessing such damages it is proper to take into account his age, the extent and character of his injuries, and whether the same are temporary or permanent, the value of any time lost by reason thereof, his expenditure if any, be shown by the evidence for medical aid, medicines and nursing in treating the same, the impairment, if any, of his ability to earn money in the future, the physical pain and mental anguish suffered or likely to be suffered in future as the direct result of such injuries, all as shown by the evidence, and any other facts affecting the question of his damages and shown by the evidence, and upon a consideration of all such facts fix his damages at such sum as in your judgment will fairly compensate the plaintiff, so far as money can do, for the injuries so sustained, not exceeding the sum of $30,000.00.

(Given.)

T. M. HONAN AND
O. H. MONTGOMERY,
Attorneys for Plaintiff.

48 No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a traffic rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an actionable injury sustained by one of its employees merely because of such rule.

(Given.)

Instructions Nos. 1, 2, 3, 4, 5, 5½, and 6 above requested by plaintiff were given to the jury and the defendant at the time excepted to the giving of each of said instructions to said jury.

May 28th, 1918.

McMULLEN & McMULLEN,
Attorneys for Defendant.

OREN O. SWAILS,
Judge.

49 STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause requests the Court to give to the jury trying the same each of the following instructions numbered from 1 to 14 both inclusive.

McMULLEN & McMULLEN,
KOCHENOUR & PRINCE,
Attorneys for Defendant.

1. The burden of proving the allegations of plaintiff's complaint as made rests on the plaintiff and if you find the injury to plaintiff was caused in some other manner your verdict must be for the defendant.
(Given.)

2. Plaintiff alle es that an emergency arose requiring the action of the conductor in calling for assistance. This the plaintiff must prove as alleged and proof of custome or habit of employees of defendant will not of itself prove this allegation.
(Given.)

50 No. 3. An emergency arises when there are such circumstances and conditions present that one is compelled to act in a certain manner from which there is no escape or choice to the contrary—and unless plaintiff has shown by a fair preponderance of the evidence that the conductor acted under such circumstances, conditions and under such compulsion your verdict must be for the defendant.
(Refused.)

No. 4. A conductor cannot ordinarily hire or employ persons and bind his employer to such an extent that such employer becomes liable for injuries to such a one so employed.
(Given.)

No. 5. If you find from the evidence that Conductor Jackson had other means or ways at his command to unload the ensilage cutter on the day plaintiff was injured, or that he could have moved his train and unloaded said cutter at other places there was no emergency requiring the unloading in the way and manner it was attempted to unload the same and your verdict must be for defendant or plaintiff's first pargraph of complaint.
(Refused.)

No. 6. If you find from the evidence that plaintiff with others was at the depot in Commiskey waiting for the arrival of said
51 ensilage cutter and that upon the arrival of the same, said plaintiff and others attempted to assist in unloading the same. I charge you that plaintiff was a mere volunteer and he cannot recover.

(Refused.)

No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville Kentucky to Commiskey and other points in Indiana I charge you that this was an inter state shipment and said train and employees were engaged in inter state commerce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge that if you should find from the evidence that the plaintiff was an employe of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk.

(Refused.)

No. 8. If you find from the evidence in this case ahat plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried
52 said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured he cannot recover and your verdict must be for defendant.

(Refused.)

No. 9. There has been read to you a clause from what purported to be a classification of Rates, Rules, Tariffs and Regulations regarding the release of the defendant from burden of unloading said ensilage cutter—Rules such as the above referred to are allowed by law and have the same force and effect as a statute. If you find from the evidence that there was in force and effect at the time and place plaintiff was injured a rule that shipments such as the ensilage cutter should be unloaded by the owners thereof and you find that such rule had been filed with the inter state commerce commissioner and the Public Service Commission of Indiana I charge you it was not the duty of the defendant to unload said ensilage cutter.

(Given.)

No. 10. There can be no collateral attack upon a rule or regulation as referred to in the next above instruction, the remedy of one being the complain- to the Commission for reparation or relief.

(Given.)

53 No. 11. A published rate, rule or regulation so long as it is in force, has the effect of a statute and is binding alike on

shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect.
(Refused.)

No. 12. The law presumes that the defendant has done all in relation to any rule or tariff that the law required it to do.

No. 13. The inter state character of a shipment remains until delivery to the shipper and is still within the protection of the commerce clause of the constitution.
(Given.)

No. 14. If you find from the evidence that the rule heretofore referred to and read to you, as contained in Classification 44 was in force at the time of plaintiff's injury and you find that the same had been filed with the Inter State Commerce Commission theretofore, I charge you that it matters not whether the plaintiff was the consignee or not, the duty of the defendant was fixed and it was not required to unload said cutter.
(Given.)

The court refused to give to the jury instructions Nos. 3, 5, 6, 7, 8 and 11 above requested by the defendant and the defend-
54 ant at the time excepted to the refusal of the court to give to said jury each of said instructions and the court gave nos. 1, 2, 4, 9, 10, 12, 13, and 14.

McMULLEN & McMULLEN,
Attorneys for Defendant.
OREN O. SWAILS,
Judge.

May 28th, 1918.

No. 3.

In determining the weight to be given to the testimony of a witness, you may take into account his manner while on the witness stand, his opportunity for knowing the facts about which he testifies, his *n*ias or prejudice, if any be disclosed, how far he is corroborated by the other evidence in the case, his intelligence or lack of intelligence, if it be shown, together with all the other facts and circumstances in the case and give to the testimony of each witness such credit as in your judgment it is entitled to.

No. 4.

You are not bound to believe the testimony of a witness simply because that testimony has been sworn to nor should you disbelieve the testimony of any witness without good and sufficient
55 reason for so doing. If you meet with conflicts in the testimony of witnesses it will be your duty to reconcile such conflicts so as to believe the testimony of all the witnesses if you can do so. If you can not do this then you may believe those you deem most worth- of credit.

No. 5.

Certain interrogatories numbered 1 to 39 inclusive will be propounded to you. It will be your duty to answer each of these interrogatories in writing and sign each answer by your foreman and return the interrogatories thus answered into open court with your verdict. If there is no evidence before you from which you can properly answer any interrogatory then you may answer said interrogatory by saying "no evidence".

No. 6.

If you find for the plaintiff the form of your verdict will be "We, the jury find for the plaintiff Guerney O. Burtch and assess his damages at the sum of $—", properly filling in the amount which you find due under the evidence.

No. 7.

If you find for the defendant the form of your verdict will be "We, the jury find for the defendant."

56 No. 8.

Blank forms of verdict have been prepared for you. You may use the one which suits your finding or you may prepare one for yourselves. When you retire to your jury room you will select one of your number as foreman and when you have reached a verdict have it signed by your foreman and returned by you into open court.

Swear a Bailiff.

OREN O. SWAILS,
Judge.

The defendant duly excepted at the time to the giving of each of the above instructions to the jury by the court of its own motion.

McMULLEN & McMULLEN,
Attorneys for Defendant.

OREN O. SWAILS,
Judge.

May 28, 1918.

57 That afterwards, to-wit, on the 1st day of June 1918, the same being the 24th Judicial day of said term of said court, the following further proceedings were had in said cause in said court.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Comes now the plaintiff by his attorneys, and moves the court for a judgment on the verdict of the jury.

Comes now the defendant and files motion for a judgment on the interrogatories submitted herein, which motion reads as follows:

"STATE OF INDIANA,
Jackson County, ss:

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Motion.

The defendant in the above entitled cause moves the court
58 for judgment in its favor on the interrogatories and answers thereto returned by said jury with their general verdict in said cause notwit-standing said general verdict.

McMULLEN & McMULLEN,
KOCHENOUR & PRINCE,
Attorneys for Defendant."

And this cause is now continued generally until next term of this court.

That afterwards, to-wit, on the 25th day of June 1918 the same being in vacation of the Jackson Circuit Court the following further proceedings were had in said cause in said court.

In Vacation of the Jackson Circuit Court, June 25th, 1918.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Comes now the defendant and files *their* motion for a new trial which motion reads as follows:

59 "STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The defendant in the above entitled cause moves the court for a new trial therein on the following grounds and each of them to-wit:

1. The court erred in admitting in evidence the testimony of the witness, Clifford Hartwell as to the practice of the defendant or its conductors calling of by-standers for assistance when needed to unload heavy freight.

2. The court erred in the overruling of the motion of the defendant to strike out the answer of the witness last referred to — the question last above referred to.

3. The court erred in admitting in evidence the testimony of the witness D. M. Green as to the practice of the defendant and its conductors of calling in by-standers to assist unloading heavy articles of freight.

4. The court erred in refusing to strike out the answer of
60 the witness last above referred to — the question last above referred to.

5. The court erred in admitting in evidence the testimony of the witness Charles F. Lurton as to the practice of the defendant and its conductors of calling for assistance in unloading heavy articles of freight. The court erred in overruling the motion of defendant to strike out *their* answer of the witness to said question to the effect that it was a frequent occurrence for a train crew to ask for help.

6. The court erred in overruling the motion to strike out the answer of the witness of Oliver P. Gothlin to the following question:

"State to what extent or otherwise the acts of carriers are governed by written tariff rules filed with the Commission." The answer being "carriers so far as possible in human language are permitted to state definite and clearly in tariffs all rules and regulations to govern the relation between patron and carrier, nevertheless, times are yet to come when human ability can so state everything so clearly that interpretation will not be necessary.

7. The court erred in overruling the motion of the defendant to strike out the answer next above referred to — the question next above referred to.

61 8. The court erred in admitting in evidence the *the* testimony of the said witness Oliver P. Gothlin as to whether certain railroad carriers in his and other states have a rule in regard to handling of certain heavy and bulky freight.

9. The court erred in overruling the motion of the defendant to strike out the answer to the question next above referred to.

10. The Court erred in admitting in evidence the testimony of said witness Gothlin as to what in his experience and knowledge had been the practice of carriers with reference to the disposition of cars or bulky shipments purporting to come under a certain rule of the tariff known as 8-B.

11. The court erred in refusing to strike out the answer of said witness to the question next hereinabove mentioned.

12. Damages assessed by the jury are excessive, being too large.

13. The verdict of the jury is not sustained by sufficient evidence.

14. The verdict of the jury is contrary to law.

15. The court erred in giving instructions Nos. 1 to 8 both inclusive on its own motion and erred in giving each of said instructions.

62 16. The court erred in giving instructions Nos. 1, 2, 3, 4, 5, 5½ and 6 both inclusive requested by the plaintiff and erred in giving each of said instructions.

17. The court erred in refusing to give instructions #3, 5, 6, 7, and 8 requested by defendant and erred in refusing to give each of said instructions.

KOCHENOUR & PRINCE,
McMULLEN & McMULLEN,
Attorneys for Defendant."

Attest.
WILLARD STOUT,
Clerk J. C. C.

That afterwards, to-wit, on the 23rd day of October 1918 the same being the 9th Judicial day of the October Term 1918 the following further proceedings were had in said cause in said court.

#7716. File #14151.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Come the parties by their respective attorneys, as hereto-

63 fore, and the court being duly advised overrules defendant's motion for judgment on the answers of the jury to the interrogatories, to which ruling of the court the defendant, excepts.

The court now sustains plaintiff's motion for judgment on the general verdict, to which ruling of the court the defendant excepts.

It is therefore considered and adjudged by the court that the plaintiff Guerney O. Burtch do have and recover of and from the defendant, The Baltimore and Ohio Southwestern Railroad Company, the sum of Eight Thousand Dollars, together with his costs herein laid out and expended, with interest thereon from the time of the filing the verdict of the jury, to the rendering of which judgment the defendant objects and excepts.

The court being duly advised in the premises overrules defendant's motion for a new trial of this cause, to which ruling of the court in overruling said motion for a new trial, the defendant at the time, excepts and prays an appeal to the Supreme Court of the State of Indiana which appeal is granted by the court and the bond for said appeal is fixed at Ten Thousand Dollars, the defendant nominates American Surety Company of New York as surety on said bond which said surety is approved by the court and the defendant is given thirty days to file said bond with the Clerk of this court. Defendant is given ninety days within which time to present and file its general Bill of exceptions. All of which is ordered and adjudged by the court.

64 That afterwards, to-wit on the 21st day of November 1918 the same being in vacation of the Jackson Circuit Court the following further proceedings were had in said cause in said court.

In Vacation of the Jackson Circuit Court, November 21, 1918.

#7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Comes now the defendant and files *their* appeal bond in this cause, which appeal bond reads as follows:

"Know all Men by these presents, That we, The Baltimore and Ohio Southwestern Railroad Company as principal and The American Surety Company of New York as surety are held and firmly bound unto Guerney O. Burtch in the penal sum of Ten Thousand Dollars, to the payment of which, well and truly to be made and done, we bind ourselves our heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of November 1918.

The condition of the above obligation is such, that whereas, heretofore, to-wit:

65 On the 23rd day of October 1918, the said Guerney O. Burtch in the Jackson Circuit Court, recovered a Judgment against the said The Baltimore and Ohio Southwestern Railroad Company for the sum of Eight Thousand Dollars, in damages and cost of suit, etc., from which said Judgment of said Jackson Circuit Court, the said The Baltimore and Ohio Southwestern Railroad Company shall and will duly prosecute said appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against it then the above obligation to be null and void otherwise to be and remain in full force and virtue and law.

THE BALTIMORE AND OHIO SOUTH-
WESTERN RAILROAD COMPANY,
By MORRISON L. WAITE.
E. B. RUSSELL,
Assistant Secretary.
AMERICAN SURETY COMPANY OF
NEW YORK.
E. C.,
Resident Vice President.

Attest:
D. W. LARSEN,
Resident Asst. Secretary.

Approved by court.
October 23, 1918.
WILLARD STOUT,
Clerk."

66 And afterwards, to wit: on the 15th day of January 1919, the following further proceedings were had in said cause, to wit:

Be it remembered that on the 15th day of January 1919, comes James A. Cox sole Judge of the Jackson Circuit Court and files in the office of the Clerk of said Court, the appellant's general Bill of Exceptions duly signed and approved by said Judge and orders the same made a part of the record in said cause, which original Bill of Exceptions is in the words and figures as follows, to wit:

Attest:

WILLARD STOUT,
Clerk of the Jackson Circuit.

Filed Jan. 15, 1919.
WILLARD STOUT,
Clerk Jackson Cir. Court.

67 *Index to Evidence.*

Witness.	Direct.	Cross.	Redirect.	Recross.
Clifford Hartwell	P. —, L. 1	P. —, L. 16	P. —, L. 14	P. —, L. 2
D. M. Green	P. —, L. 1			
Dr. Dennis Mathews	P. —, L. 4	P. —, L. 6	P. —, L. 26	
A. G. Osterman	P. —, L. 9	P. —, L. 1	P. —, L. 28	
Charles F. Lurton	P. —, L. 19	P. —, L. 1		
Ray Moppin	P. —, L. 14			
S. Tincher Moppin	P. —, L. 4			
Granville Arbuckle	P. —, L. 13	P. —, L. 1		
Everett Arbuckle	P. —, L. 5	P. —, L. 10		
G. F. Artz	P. —, L. 18			
Mrs. Guerney Burtch	P. —, L. 24			
Guerney O. Burtch	P. —, L. 18	P. —, L. 19	P. —, L. 3	
Oliver P. Gothlin	P. —, L. 5			

Filed Jan. 15, 1919.
WILLARD STOUT,
Clerk Jackson Cir. Court.

68 *Index to Evidence.*

Witness.	Direct.	Cross.	Redirect.	Recross.

Filed Jan. 15, 1919.
WILLARD STOUT,
Clerk Jackson Cir. Court.

69 Filed Jan. 15, 1919. Willard Stout, Clerk Jackson Cir. Court.

In the Jackson Circuit Court, May Term, 1918.

Cause No. 7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Plaintiff's Attorneys:

O. H. Montgomery.
Thomas Honan.

Defendant's Attorneys:

Harry McMullen.
Cassius McMullen.

70 The plaintiff to maintain the issues on his part introduced the following evidence, to wit:

The following interrogatories were introduced and read in evidence to the Jury.

STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

No. 7716.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

The plaintiff submitts and moves the Court to require defendant through its proper officer or agent to answer under oath each of the following interrogatories numbered from 1 to 4 inclusive, to-wit:

No. 1. Was defendant, The Baltimore and Ohio Southwestern Railroad Company, on October 24th, 1917, engaged in operating a steam railroad extending through the town of Commiskey in Jennings County, Indiana?

Answer. ——.

No. 2. Did defendant on October 24th, 1917, have in its employ and engaged in operating a railroad in this state more than five persons?

Answer. ——.

No. 3. Was one Ed. Jackson, on October 24th, 1917 in defendant's employ as a train conductor?

Answer. ——.

No. 4. Was said Ed. Jackson as conductor in charge of a local freight train operated by defendant through the town of Commiskey, Indiana, on October 24th, 1917?

Answer. ——.

(Signed) MONTGOMERY & MONTGOMERY,
Attorneys for Plaintiff.

Filed with the clerk of the Jackson Circuit Court on the 25th day of March 1918.

71 The following are the answers to the interrogatories submitted by the plaintiff, which were introduced and read in evidence.

STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, February Term, 1918.

GUERNEY O. BURTCH

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

Answers to Interrogatories Submitted by Plaintiff.

In answer to the interrogatories submitted by the plaintiff, filed March 25, 1918, defendant says:

Answer No. 1. Yes.
Answer No. 2. Yes.
Answer No. 3. Yes.
Answer No. 4. Yes.

(Signed) F. B. MITCHELL,
General Superintendent of the Baltimore and Ohio Southwestern Railroad Company.

STATE OF OHIO,
County of Hamilton, ss:

Frederick B. Mitchell, being first duly sworn, says that the answers to interrogatories set forth above are true.

F. B. MITCHELL.

Sworn to before me and subscribed in my presence, this 1st day of April, 1918.

[SEAL.] WILLIAM A. EGGERS,
Notary Public in and for Hamilton County, State of Ohio.

72 CLIFFORD HARTWELL, being the first witness, was duly sworn to testify the truth and nothing but the truth, testified as follows:

Q. State your name to the jury.
A. Clifford Hartwell.
Q. Where do you live?
A. Commiskey, Indiana.
Q. What is your business?
A. Telegraph operator and farmer.
Q. Where is your post of duty as telegraph operator?
A. Commiskey depot.
Q. That is on the line of the Baltimore and Ohio Southwestern Railroad company?
A. Yes, sir.

Q. Were you stationed there on the 24th of last October?
A. I was.
Q. Were you on duty on that date?
A. Yes, sir.
Q. Was there a local freight train passed through that town on that day going north?
A. Yes, sir.
Q. What time was it due?
A. I believe it was due about 12:10.
Q. In the day time?
A. Yes, sir. P. M.
Q. Did it arrive on time that day?
A. No, sir. It did not.
Q. About what time did it arrive?
A. As well as I remember it was about 2:50 P. M. or about three o'clock. It might have been a little bit later than that. Maybe about four.
Q. Something like four hours late?
A. I judge so, Yes.
73 Q. Who was in charge of that train, what conductor?
A. Ed. Jackson.
Q. Tell the jury on which side of the main track, the station was there in Commiskey at that time.
A. On what we call the West side.
Q. What sort of a platform was there in October, last?
A. Brick platform.
Q. About how high is that platform above the level of the ground?
A. I judge about ten, twelve or possible a few more inches. I don't know exactly.
Q. What track, if any, is immediately east of this platform?
A. What we call the main track.
Q. What if any track lies east of the main track?
A. What we call the passing track.
Q. That is for what purpose?
A. It is used as a passing track.
Q. Does it connect at both ends with the main track?
A. Yes, sir.
Q. About how long is that passing or side track?
A. About a quarter of a mile long.
Q. Then is there another track or was there at that time, just east of that passing track?
A. Yes, what we call the station track.
Q. What sort of a track is that?
A. It is a length of track holding about ten cars.
Q. Sometimes called the loading track?
A. Yes, or the station track.
Q. When this local freight train arrived, on what track did it go?
A. As well as I remember, it pulled into the side track, I could not say for sure.
Q. Do you recall the circumstances of having to unload an ins-lage cutter that afternoon?

74 A. Yes, sir.

Q. Were you present during a portion of the time when they were unloading the cutter?

A. I was.

Q. What, if anything, did you hear the conductor, Mr. Jackson, say with regard to getting timber or lumber for unloading that ins-lage cutter?

A. I heard him say to the crowd that was around, I don't remember how many there was, for someone to get some heavy timber to slide the cutter out of the car but I do not recall that he spoke to any particular ones.

Q. Did he ask any of the men to assist in unloading it?

A. Yes, all of us.

Q. How heavy was that ins-lage cutter?

A. I judge 1,700 pounds.

Q. How did they first get it from the end of the car to the door?

A. I believe they slide it on the floor. I don't remember whether they had rollers under it or not?

Q. Were you there after they got it out on the plank?

A. No, sir. I only assisted in getting it to the car door.

Q. Were all articles of local freight usually unloaded at the station platform?

A. Usually unloaded on the platform. Yes, sir.

Q. Do you recall the fact that an ins-lage cutter had come in there some two months before that?

A. I don't know.

Q. Did you see one there?

A. I don't remember.

Q. You don't recall that?

A. No, sir.

75 Q. Do you remember whether there was any cars standing on this north track that afternoon?

A. No, sir. I do not remember. I don't know.

Q. Do you know any reason why his ins-lage cutter might not have been unloaded on the platform that day?

A. No, sir. There was a passenger train number 39 due there at 4.31 and this local freight had to take a side track in order to clear that train.

Q. After that train had passed, if the local freight had been put on the main track, could this cutter have been unloaded on the platform?

A. I suppose it could have been.

Witness CLIFFORD HARTWELL, cross-examined by H. McMullen, attorney for the defendant, testified as follows:

Q. What business are you now working?

A. I am second trick operator at Commiskey.

Q. You came over here by subpœna?

A. Yes, sir.

Q. Sheriff came to you and told you to come over?

A. Yes, sir.
Q. How long had you been working at that place?
A. About eight years.
Q. Who is the agent there now?
A. D. M. Green.
Q. Was he there at that time?
A. He was in their employ, but I don't believe he was on the job at that time.
Q. This freight train was from where?
76 A. Louisville.
Q. This cutter was in one of the cars on that train that came from Louisville?
A. Yes, sir.
Q. You say Ed. Jackson was the conductor?
A. Yes, sir.
Q. Who else was on the train? Do you remember the other employes?
A. I don't remember. Yes, one man I remember, Robertson was his name.
Q. In what capacity was he serving the defendant railroad?
A. Brakeman.
Q. Brakeman on this freight?
A. Yes, sir.
Q. He is now in the army?
A. I think so.
Q. What others?
A. I believe a man by the name of Fitch.
Q. Do you know where he is?
A. No, sir.
Q. You don't know his whereabouts?
A. No, sir.
Q. Not working for the Railroad so far as you know?
A. I could not say.
Q. Do you remember any others?
A. That is all.
Q. Do you remember Bowden?
A. No, sir.
Q. Anyway they had three brakemen and a conductor and fireman, etc.
A. They usually do, I suppose they did that time.
Q. This train got in there a little after four o'clock or something near four?
A. As well as I remember.
77 Q. About how many cars in that train?
A. I don't remember.
Q. Just an ordinary freight train?
A. Yes. I think as well as I remember that there were eight, ten or twelve cars. I would not say for sure.
Q. At Commiskey the time cards read east and west?
A. Yes, sir.

Q. And when you say North, you mean going toward North Vernon?

A. I mean East.

Q. This platform and station is on what side of the main track?

A. What we call the West side.

Q. It is on the right hand going to Louisville?

A. Yes, sir.

Q. And the passing track and the station track are over on the other side of that?

A. Yes, sir.

Q. The station is not between any tracks?

A. No, sir.

Q. This platform is you say about ten or twelve inches above the ground.

A. Yes, sir.

Q. I judge that is about right. Possibly a little higher.

Q. Might it possible be lower?

A. Yes.

Q. In other words the step on a passenger coach is about one good step down?

A. Yes, sir.

Q. This is what you might call a country station?

A. Yes, sir.

Q. Commiskey is a village of about what population?

78 A. One hundred inhabitants.

Q. Cross the main track, then cross the passing track and get over the stub switch, how is that as regards being about level?

A. There is a common driveway there.

Q. What would you say about the driveway?

A. About on the level. If anything a little bit higher.

Q. The ground over there at the station track and passing track would be something like ten or twelve inches lower?

A. No, sir. It is filled in there until it is about level with the platform.

Q. So that the ground over by the passing track would be about on the level with the top of the platform?

A. Yes, sir.

Q. And this day, what did you do? What part did you do in the unloading?

A. I helped the boys get this cutter to the door of the car.

Q. Before this was taken out, was some other stuff taken out of the car?

A. I don't remember.

Q. That was what they call less than car load lots?

A. Yes. I judge so.

Q. They are classified as L. C. L.?

A. Yes. Less that car load lots.

Q. Was this what they call L. C. L.?

A. Yes. As well as I remember.

Q. Then you say Conductor Jackson said for someone to get some heavy timber to slide this cutter out on?

A. Yes, sir.
Q. Was that about the first thing he said, if you remember?
A. I don't know.
Q. Were you out there when the train came in?
79 A. Yes, sir.
Q. Did you stay with Jackson and the car until the cutter was up to the door?
A. Yes, sir.
Q. When he said to get some timber or lumber to slide the cutter out one, he said that to the whole crowd?
A. Yes, sir.
Q. About how many were there in this crowd?
A. I don't know exactly. I judge eight or ten. Possibly not that many.
Q. Burtch was one of them?
A. Yes, sir.
Q. He had been around that day to see if the cutter came in?
A. Yes, he came up about three o'clock.
Q. Did you see any other owner of the cutter there?
A. No, sir.
Q. Were they waiting for the cutter?
A. I don't know.
Q. What did these men do when Jackson said to get some heavy timber?
A. I don't know. I was working there, going backwards and forwards from the car to the platform and I don't know who got the timber. I could not say for I did not see anyone get it.
Q. Someone got them?
A. Yes, sir.
Q. Where was Jackson during this time?
A. I can't remember just where he was or what he was doing. I suppose he was assisting his brakemen.
Q. Did you see these timbers or boards?
A. No, sir.
Q. You had gone into the depot?
80 A. Yes, and I was on the other side of the car.
Q. Where was Jackson when these timbers were brought?
A. I don't know. I could not say just where he was.
Q. Did you get up in the car and assist?
A. I did.
Q. Who else was assisting in the car?
A. I don't remember but I think Jackson and two or three brakemen.
Q. You don't know whether Burtch was in there or not?
A. No, sir.
Q. How did you have to get this to the door?
A. As well as I remember we slide the cutter on the floor of the car.
Q. Did you have some rollers under it?
A. I don't remember whether we had roller or not.
Q. Had Burtch helped?
A. I don't remember.

Q. Anyway you got it to the car door?
A. Yes, sir.
Q. What kind of timbers were these?
A. I don't know what kind of timber they were.
Q. Do you remember what kind of wood they were?
A. No, sir.
Q. How wide were they?
A. About eight inches wide.
Q. About how thick were they?
A. About two inches I judge.
Q. You did not measure them that day?
A. No, sir.
Q. Have you seen them since?
A. No, sir. Just when they were under the machine.
81 Q. Did it look as though there were any defects in them?
A. I did not see any in them.
Q. You were not out there at a time of any trouble?
A. No, sir.
Q. Do you know who had a hold of it as you left?
A. No, sir.
Q. Where was it, at the door when you left?
A. Up to the door, ready to be slid out when I left.
Q. How were these timbers placed?
A. One end in the car door and the other end on the ground.

Redirect examination.

By O. H. Montgomery, attorney for the plaintiff:

Q. What if any timber did the defendant company have or keep at that time about the station there to unload heavy articles of freight?
A. We have ordinary skids. Station skids.
Q. What is the character of those?
A. It is a length or strip of timber with iron edge about eight feet long and possibly eighteen inches wide.
Q. Commonly called barrel skids?
A. Yes, sir.
Q. Do you know why these were not used in unloading the cutter?
A. I suppose not long enough. I don't know why.
Q. If they had placed this car on the main track and used the barrel skids, what would you say as to being able to unload it on the platform?

The defendant objects for the reason that the witness has not shown any knowledge on which to base any expert opinion as to what might have been done and it is immaterial in this case.
The court sustained the objection; exception for the plaintiff.

82 Q. You have been there about eight years?
A. Yes, sir.
Q. Tell the jury what has been the practice of the defendant company or its conductors at that station, within your knowledge,

of calling on bystanders for assistance when needed to unload heavy freight.

The defendant objects for the reason that in this case they can not introduce evidence in regard to the custom or practice and for the additional reason that any assumption of such authority by this conductor or any other official would be in violation of the law.

The Court overruled the objection; exception for the Def.

A. Frequently I have heard him ask.

The defendant now moves to strike from the record the answer of the witness, because it is a conclusion, it is not responsive to the question and because it is improper to introduce a custom under the pleadings in this case and because of the fact that any such practice would be in violation of the Federal statute and the conductor would have no right whatever to call upon anyone or bind the company in any way.

Motion to strike the answer from the record is overruled; exception for the defendant.

Q. State over what period of time this practice continued.
A. I can't say for I don't know.

Recross-examination.

By the attorney for the defendant:

Q. Those skids you spoke of being about eight feet long and eighteen inches wide, those are the ordinary skids used at the station?
A. Yes, ordinary station skids.
Q. And in this instance, they were not quite long enough?
A. I don't know. I expect that was the reason they did not use them.

83 D. M. GREEN, being duly sworn upon his oath to testify the truth and nothing but the truth, testified as follows:

Q. State your name to the jury.
A. D. M. Green.
Q. Where do you live?
A. Lovett, Indiana.
Q. What is your present occupation?
A. Agent at the telegraph office at Commiskey.
Q. You are station agent at Commiskey?
A. Yes, sir.
Q. There in the service of the defendant company, the Baltimore and Ohio Southwestern Railroad Company?
A. Yes, sir.
Q. How long have you been employed at that station as agent?
A. Three years this coming November.
Q. You were agent last October?
A. Yes, sir.

Q. Do you know anything about the accident that occurred the 24th of last October?

A. But very little. I was not there at the hour that it occurred.

Q. State to the jury what has been the practice, within your knowledge, of the defendant and its local freight conductors at that station during the time you have been station agent with regard to calling upon bystanders to assist in unloading heavy articles of freight prior to October 24, 1918.

The defendant objects to the question for the reason that in this case they can not introduce evidence in regard to the custom or practice and for the additional reason that any assumption of such authority by this conductor or any other official would be in violation of the law.

84 The Court overruled the object-; exception for the Def.

A. It has frequently been the practice that the conductors would ask bystanders to help.

The defendant now moves to strike out the answer of the witness for the reason that it is a conclusion, not responsive to the question and because it is improper to introduce a custom under the pleadings in this case and because of the fact that such practice would be in violation of the Federal statute.

Motion to strike the ans-er from the record is overruled by the Court, exception for the defendant.

D. M. GREEN is now used by the defendant, out of order, by agreement of parties.

Direct examination.

By H. McMullen, attorney for the defendant:

Q. What classification or number of the official classification was in effect on the Baltimore and Ohio Railroad in October 1917?

A. Forty-four.

Q. You identify this as the classification?

A. Yes, sir.

Q. That has been in effect since when?

A. I do not remember the date.

Q. This is the one that is in effect now?

A. Yes, sir.

Q. Defendant's exhibit #1 marked on the first page of the official classification #44 is the one that was in force in October 1917 and has been since and was for sometime before that?

A. Yes, sir.

85 Dr. DENNIS MATHEWS, the plaintiff's witness, being duly sworn upon his oath to testify the truth, the whole truth and nothing but the truth, testified as follows:

Q. State your name to the jury.
A. Dennis Mathews.
Q. Where do you live?
A. Commiskey, Indiana.
Q. What is your profession or business?
A. Physician.
Q. Are you a graduate of any medical college?
A. Yes, sir.
Q. What one?
A. Hospital Medical College of Louisville.
Q. How long have you been engaged in the practice of medicine?
A. July first, 1903.
Q. Where have you been located during that time?
A. Six years in Washington county and the rest of the time in Commiskey.
Q. Do you know the plaintiff in this suit, Guerney O. Burtch?
A. Yes, sir.
Q. Where does he live?
A. About a half mile from Commiskey.
Q. Do you recall the circumstances of his having been hurt the 24th of last October?
A. Yes, sir.
Q. Were you called upon professionally to treat him at that time?
A. Yes, sir.
Q. What relation do you have in a business way with the defendant railroad company?
A. Company physician. Also surgeon.
86 Q. Tell the jury in what condition physically you found Mr. Burtch on the day of the accident.
A. He was suffering from the shock and suffering much pain. I did not see him until an hour or two after the injury. There was quite a little swelling about the tenth dorsel vertebre; apparently a fracture of three ribs; he seemed completely paralized below the waist line; and absolutely no motion in the right leg and very little in the left; there was no sensation — the right leg and a retention of urin- and his bowels acted involuntarily.
Q. On which side were the broken ribs?
A. Left side.
Q. Where was he at the time you called to see him?
A. At the depot at Commiskey.
Q. Was he conscious or unconscious at that time?
A. He was conscious.
Q. Where was he taken?
A. After I had given him some relief, we carried him home on a cot.
Q. What was evident regarding his suffering at that time?
A. The pain at first seemed to be very severe. He could scarcely breathe.
Q. How long did that intense pain continue to be with him?
A. The intense pain required the use of an opiate only a day or two.

Q. What opiates did you give him to relieve him?

A. I first gave him a hypodermic, consisting of one fourth grain of morphine and one one-hundred and fiftieth grain of atrophine-sulphate. After that I left cod-ine in one fourth grains to be taken as needed.

Q. Have you continued to look after him professionally since that?

A. For two or three weeks I was there every day and then later just at intervals. I don't remember the dates of my visits.

87 I followed up the case until it looked like nature would have to do the work of repairing.

Q. How long was he confined to his bed?

A. I don't know exactly but I think three months or more.

Q. What was his condition as to being helpless or otherwise during that three months?

A. During the first two weeks he had to be turned in bed.

Q. Following that what was his condition?

A. His condition gradually improved as the pain became less and less. He began to regain a little motion in his limbs until he could turn himself in bed and in three or four months he was able to sit up by being helped out of bed.

Q. Are you still attending him professionally?

A. I haven't been. Dr. Osterman called to see him and he has been under the care of ah osteopath.

Q. You are not administering to him regularly now?

A. No, sir.

Q. Tell the jury the condition of this man with reference to his paralysis on your last examination.

A. At my last examination he still used the catheter, he had no control over the action of his bowels, that is, he was not conscious of their acting, probably had some sensation in the right leg and his motion was getting better.

Q. What in your judgment caused the paralysis?

A. The injury to the spinal cord.

Q. Can you tell the nature of that injury? Describe just what condition you found.

A. Best I could tell, the vertebra and ribs had just mashed the fibre of the spinal cord.

88 Q. What was the effect of this paralysis on the organs and muscles below the waist line?

A. At the time of the injury and for sometime, there seemed to be no sensation whatever.

Q. At your last examination did he have sensibility or sensation in those parts?

A. It has been so long, I don't remember. I know he used the catheter and he said he could not feel it, so I judge there was very little sensation.

Q. What danger attends the use of a catheter?

A. The only danger is infection. Or maybe inflam-ation of the bladder.

Q. What care is necessary to avoid infection?

A. The catheter should be sterilized with some anticeptic solution

or washed thoroughly with sterile water. It should be kept in anteceptic solution.

Q. What did he do to guard against trouble from involuntary action of the bowels.

A. I advised him to keep something under him. His bowels did not act unless he took some sort of medicine, so then he could be on the look out.

Q. Didn't he have to be cared for just like a baby?

A. While he was in bed he did, since that time I don't know.

Q. What is your opinion as to the probable permanency of the condition you have just described?

A. My judgment is that there may be some improvement from to time but there will never be a permanent cure.

Q. You may state whether or not he is able to perform any manual labor in his present condition.

A. I should say he is not.

89 Q. What is your opinion as to whether he will ever be able to perform manual labor?

A. I am inclined to think he never will be.

Cross-examination.

By H. McMullen, Att'y for the Defendant:

Q. When did you see him last professionally?

A. I don't remember the time.

Q. About how long ago? Could you give us an idea?

A. It has been quite a while ago. I haven't examined him during the last two months.

Q. This is May. Then you haven't examined him during May or April.

A. I think not.

Q. The first three months after he was injured, you visited him off and on quite frequently?

A. Yes, sir.

Q. Then after that, have you visited him professionally since the first three months?

A. He has been under the care of other physicians and I haven't found it my duty.

Q. You haven't visited him?

A. I think not.

Q. He was injured in October and you visited him for the first three months, then you haven't visited him since the first of February?

A. Something like that.

Q. Probably you did visit him about the first of February or the last of January?

A. Sometimes I was there to see other members of the family.

Q. Are you their family physician?

A. Yes, sir.

90 Q. And was before the injury?

A. Yes, sir.
Q. And are yet so far as the family is concerned?
A. Yes, sir.
Q. How long have you been the family physician before this man was injured?
A. I have doctored the family ever since they have been married.
Q. Brought the children into the world?
A. Yes, sir.
Q. What had you attended him for before this, if anything?
A. I don't remember. It seems as though he had malaria once.
Q. When was that?
A. Four or five or six years ago.
Q. Before his marriage?
A. Yes, sir.
Q. How long did you have to keep him under the influence of Narcotics on account of the pain?
A. Not very long. After the first twenty-four hours I left some cod-ine tablets and he was to take them as he needed them to relieve the pain.
Q. And before the three months were up he had ceased to use them?
A. Yes, sir.
Q. This pain had begun to abate before you left him?
A. Yes sir.
Q. About how long did he continue using the cod-ine?
A. Month or so.
Q. What treatment did you give the ribs?
A. Put some adhesive strips on.
Q. They healed nicely?
A. So far as I could tell.
91 Q. There was no more pain about that. The trouble was from the legs and lower organs?
A. Yes, sir. The best I could tell, there were three ribs broken.
Q. You just put adhesive strips on to hold them together?
A. Yes, sir.
Q. Have you seen that part of the body since?
A. I haven't for sometime.
Q. But at the time you did examine them, they were healed?
—. Yes, sir.
Q. There was also a slight depression about the vertebre?
A. That was what we decided. The vertebre had been twisted in some way which injured the spinal cord.
Q. The spinal cord was injured by the vertebre pressing on it?
A. Yes, sir.
Q. Did you ever have an ex-ray made of this man?
A. No, sir.
Q. You did not see him under an Ex-ray?
A. No, sir.
Q. Vertebre, tell us what you mean by that.
A. Well, the vertebre is one of the bones of the spinal column.
Q. What we laymen call the back bone?

A. Yes, sir.
Q. Made up of what?
A. Made up of 26 bones.
Q. How are they placed on each other?
A. Just in rotation. One on top of the other.
Q. Like so many buttons with holes in them?
A. Yes, sir.
Q. The spinal cord runs through them?
A. Yes, sir.
92 Q. In your opinion one was displaced so that it pressed on the spinal cord and caused paralysis?
A. Yes, sir.
Q. Which one?
A. The best I could tell it was about the tenth dorsel. That was at the time of the injury. A few days afterwards there was a slight enlargement which we failed to detect at the time of the injury.
Q. Could you tell of any displacement there by touch?
A. I could not.
Q. How could you?
A. From the swelling.
Q. The swelling went down before you left?
A. Yes, sir.
Q. After the swelling had gone down, did you examine him?
A. Yes, sir. There seemed to be some enlargement there and a tightening of the tissues.
Q. You spoke of an Osteopath? Is he at Columbus?
A. Yes, sir.
Q. You say there was total paralysis of the right leg?
A. Yes, sir.
Q. How about the left leg?
A. Sensation was diminshed in the left leg. But there was some feeling.
Q. Was there any movement?
A. Yes, very little at the start though.
Q. As he gained his health, it got some better?
A. Yes, sir.
Q. Did you notice a decided improvement in the right leg?
A. Not in the sensation.
93 Q. No sensation at all?
A. No, sir. You could press on his foot and he did not know it at all.
Q. There was marked improvement before you left at the end of the three months?
A. Quite a little improvement.
Q. How soon did you first begin to notice improvement in the right leg?
A. After the first month, you could begin to notice some improvement right along.
Q. How about this movement?
A. It began to be so he could throw his leg up and down just a little.

Q. Perhaps a month after he was hurt?
A. Month or more.
Q. He was still in bed?
A. Yes, sir.
Q. Was he in bed up to the time you left him?
A. Yes, sir. But he was able to sit up in a chair by being helped out of bed.
Q. You could notice a continued improvement?
A. Yes, but it was slow.
Q. Still he was on the up-grade and was getting that way when you left him?
A. Yes, sir.
Q. You haven't examined him lately though?
A. No, sir.
Q. He never had what we laymen call a broken back?
A. I would not call it a broken back.
Q. Just what would they call it?
A. Well, they might call it a broken back.
94 Q. If it had been what we call a broken back, there would have been no motion at all in the legs, would there?
A. No, sir.
Q. Nor would there have been any improvement in the legs?
A. That all just depends. If you have a back broken, it just depends on the injury there. You can have the spinal column or the vertibre broken and still not have the spinal cord injured in any way.
Q. The spinal cord severed would mean immediate death?
A. Yes, sir.
Q. If the spinal cord was severed, there could be no improvement?
A. No, sir.
Q. From what you have seen and the examinations you have made and the improvement that has been going on, what would you say as to the condition of the spinal cord?
A. I would have to say that the spinal cord was improving also.
Q. Would you say ther- was a replacement of the vertebre or what caused the improvement in this man?
A. Just a building up. Since he got up his general health is better.
Q. You have noticed that?
A. Yes, sir.

Redirect examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. But the cause is not removed?
A. No, sir.
Q. And in your opinion never will be?
A. That is my opinion.
95 Q. But because of his activity and general upbuilding of the muscles he has a little better use of himself?
A. Yes, sir.

Dr. A. G. OSTERMAN, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. State your name to the jury.
A. A. G. Osterman.
Q. Where do you live?
A. Seymour, Indiana.
Q. How long have you lived in this county?
A. Thirty-nine years.
Q. What has been your business during those thirty-nine years?
A. The practice of medicine.
Q. Of what medical school are you a graduate?
A. Louisville medical college.
Q. What has been the nature of your practice?
A. I have done general practice and everything that came to me.
Q. Have you ever met the plaintiff, Guerney O. Burtch?
A. Yes, sir.
Q. Did you examine him professionally at any time?
A. Yes, sir.
Q. About when was that?
A. I don't remember the exact time. I have the dates but I failed to bring them with me but I know it was sometime during the extreme cold weather.
Q. Did any other physician or surgeon examine him at that time?
A. Dr. Staeman of North Vernon.
96 Q. Who is he?
A. He is a practicing physician and surgeon at North Vernon.
Q. Do you know what relation Dr. Burns holds toward the defendant company?
A. No, sir.
Q. Whether he is the company physician or not?
A. I do not know.
Q. How many trips did you and Dr. Staeman make to see Mr. Burtch?
A. Twice, about two weeks apart.
Q. What examination did you and Dr. Staeman make of him physically?
A. We got his history first and then went over his body looking for the results of the injury.
Q. You were informed that he had been accidently injured?
A. Yes, sir. He told us that he had been crushed by a heavy weight dropping on him some weeks before.
Q. Where was he at the time you examined him?
A. At his home.
Q. In what position was he when you arrived?
A. In a chair.

Q. You may describe to the jury what injuries you found at that time.

A. We stripped him and found one of the vertebræ out of position. If I remember right it was about the eighth or tenth dorsel vertebræ.

Q. Was that at a point where some ribs had been broken?

A. You could not tell by the sight of the injury whether ribs had broken or not.

Q. Go on and tell in what condition you found him?

A. We found him paralyzed and could stick a pin in him, and he would not know it. He had no sensation *at* in the right side and was completely paralyzed and there was degeneration of the muscles.

Q. Could he move the right leg without help?

97 A. He could not move it at all.

Q. What was the condition of his bladder and bowels?

A. He had no control over his bladder and bowels.

Q. How was his bladder emptied, by what means?

A. With a catheter.

Q. How is a catheter used?

A. It is an instrument and is inserted into the bladder.

Q. What danger attends the use of an artificial instrument in removing water?

A. There is danger in carrying filth or some dirty matter into the bladder which will be spread through the whole system.

Q. What would be the danger of introducing filth into the bladder in that way?

A. Well, these particles work up the uterus and into the kidneys.

Q. Then what follows.

A. Inflammation.

Q. What was the condition of his bowels at that time?

A. His bowels moved without his knowing anything about it.

Q. With bowels in that condition, what is necessary to keep and protect a person?

A. To keep him clean, it would be necessary to care for him just like you would a baby.

Q. In going out in company in that condition, what would be the necessary caution to make the person clean?

A. Watch him and keep him clean. Examine him to find out if his bowels had moved and remove the filth around those parts.

Q. Could he take care of himself in that condition?

A. Oh! No, no.

98 Q. What was his condition as to sensibility in the lower *dominal* muscles?

A. I don't believe we examined the sensation of his sexual organs.

Q. You don't know about them?

A. I think very likely the greater part of the sensation had disappeared.

Q. What from your examination and judgment would you say the cause of this paralysis?

A. Injury to the spinal cord.

Q. What was Burtch's condition as to being able to perform any manual labor?

A. He could not do anything only with his hands. He was compelled to remain in his chair.

Q. What is your judgment as to whether his injuries are permanent or temporary?

A. I think they are permanent.

Q. What is your opinion as to whether he will ever be able to do any kind of manual labor?

A. I don't think it will ever be possible.

Q. You and Dr. Staeman made this examination together?

A. Yes, sir.

Q. Do you know whether you agreed on all results or not?

A. Entirely.

Q. Did you send in a report to the defendant company about that?

A. No, sir.

Cross-examination.

By McMullen, att'y for the defendant:

99 Q. About when was it you made that examination?

A. I could not give you the date. It was during the intense cold weather.

Q. Just about when?

A. In January or February.

Q. Was *in* on December 29th?

A. Away after that.

Q. Was any other physician in charge of the case when you were there?

A. I could not say.

Q. Do you know Dr. Mathews?

A. Yes, sir.

Q. Did you see him?

A. I did at his office but he did not go to the house with us.

Q. Do you know whether he was in charge of the case at the time or not?

A. No, sir.

Q. Anyway when you got there the man was sitting in the chair?

A. Yes, sir.

Q. You think this was along in January or at least in the cold weather?

A. It was below zero the morning we went there.

Q. Did you go there twice?

A. Yes, sir.

Q. Was it the first or second time you went that you made an exam.?

A. We made an examination both times. The second visit was made to see if there was any improvement in the paraysis.

Q. The second time there was no motion?

A. No, sir.

Q. Absolutely no sensation?

A. No sensation in the one limb at all.

100 Q. In other words from the time you went there the first time until you went there the second time, there was no change whatever?

A. There was still further degeneration of the muscles. They were shrinking and schriveling.

Q. About how long was it between the visits?

A. Two weeks.

Q. Did you see him walk toward the chair on crutches?

A. No, sir.

Q. In other words, when you were there during that cold weather last December or January there was absolutely no motion of the leg?

A. No, sir. There was no motion, especially in the foot.

Q. There was absolutely no motion or any control of the foot that you saw.

A. No, sir.

Q. You did not get from the history of the case that he had been drawing it up and down in bed?

A. No, sir.

Q. Did you get the information that from about the first month on, he could pull his leg up and down in bed?

A. No, I don't remember.

Q. You did not get that history from Dr. Mathews?

A. No, sir.

Q. Your opinion is based on your examination and confirmed by your second visit?

A. Yes, sir.

Q. On your first visit, was there any motion?

A. No, sir.

Q. In either foot?

A. In the one foot there was no motion but the other one, he could move that one.

101 Q. Talking about the worst one of the two, on your first visit, it was your opinion that there would never be any motion in that leg?

A. Yes, sir.

Q. Would it gradually get worse and worse?

A. Yes, sir.

Q. As to motion and sensation also?

A. Yes, sir.

Q. Did you get a report from Dr. Mathews regarding the improvement in that leg?

A. No, sir. I did not see Dr. Mathews until we came back from the house.

Q. Supposing his right leg had shown improvement, what would you say?

A. Part of the paralysis was due to a growth on the spinal cord and the shrinking of that growth would necessarily bring on improvement.

Q. If there had been some improvement, would you say that this growth was getting better?
A. Yes, sir.
Q. What would you say if there was a growth, whether or not it would be permanent or finally removed.
A. That growth might be removed by shrinking.
Q. What would you say, whether the man would be permanently injured or whether he might get well?
A. It depends on the size of the growth that was left. And the amount of pressure on these various parts of the spinal cord.
Q. What would you say if there had been a growth and the man had shown gradual improvement?
A. That the pressure was being taken off.
Q. In that case you would say that there might be final improvement?
A. Yes, sir.
102 Q. Would this growth cause the condition of the bladder and bowels?
A. Yes, sir. Pressure on the lower segments of the spinal cord.
Q. That is what caused the trouble with the bladder and bowels?
A. Yes, sir.
Q. And if the growth would finally be removed, would the trouble with the bladder and bowels be removed?
A. Yes, sir.
Q. This trouble was not caused by a blow?
A. No, sir. The injury was almost a complete severance of the cord. That would cause loss of control. Complete severance of the cord would, of course, have meant death.
Q. With complete severance of the cord, there would not have been any chance for the man?
A. Absolutely none.
Q. You say it dislocated the tenth dorsal vertebra?
A. Yes, sir.
Q. How do these vertebræ effect that part of the body?
A. It depends on which vertebrae are hurt.
Q. Up higher it effects the arms and lower down the other parts?
A. Yes, sir. Going higher, it effects the nerves and produces almost instant death.
Q. Suppose his motion was getting better and the sensation better and there was marked improvement, would you say that his general condition would improve?
A. Yes, sir.

Redirect examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. How long would it take a growth to disappear?
A. Usually two or three months it would become less and shrink but the entire growth would never di-appear.

103 Q. But it was your opinion that the injury was to the cord itself?

A. Yes, sir. I would not imagine a condition of that kind but what it was from an injury to the cord.

Q. Tell the jury what aids a surgeon in determining the exact injury to that part of the spine.

A. The exact injury done would be the only thing that would determine a question of that kind.

Q. What would you say with reference to manipulating the spinal cord in the condition in which you found his?

A. It might cause a complete severance of the cord and of course do more damage than good. There are legaments that hold this together and unless the physician waits until those parts can heal it is very dangerous to manipulate the vertebræ.

Mr. CHARLES F. LURTON, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery:

Q. State your name to the jury.
A. Charles F. Lurton.
Q. Where do you live?
A. Commiskey, Indiana.
Q. How long have you lived there?
A. Thirty five years.
Q. What is your business?
A. Merchant.
Q. How long have you been engaged in the merchandise business?
A. Ever since I have been there. About 35 years.
Q. What other business have you been connected with?
A. I was agent for the Baltimore and Ohio railroad company for about fifteen years.

104 Q. The defendant Baltimore and Ohio Southwestern Railroad Company?

A. Yes, sir. I was with my father for about nine years and after his death I was agent for about fifteen.

Q. When did you cease to be agent?
A. 1913, I think it was. About five years ago.

Q. From your knowledge what was the practice while you were agent, of the defendant and its freight conductors in the way of calling for assistance in unloading heavy articles of freight destined to that point.

The defendant objects to this for the reason that in the first place, the plaintiff, Guerney O. Burtch alleges that this was an emergency and that was the cause and reason for employing this plaintiff by the conductor. It is improper to prove the practice that is quite contrary to the law which forbids any discrimination between one

shipper and another. It is improper to prove the authority of a conductor by custom and there is no allegation in the complaint as to any custome inquired about of this witness. It is immaterial, misleading and prejudicial to the defendant in this case and also the knowledge of the witness is too remote from the time of the occurrence mentioned in this complaint.

Objection overruled by the court, exception for the defendant.

A. It is a very common occurrence for a train crew to ask someone to help with heavy freight.

105 The defendant now moves to strike out the answer of the witness for it is not responsive to the question and all objections given in the objection to the question.

Motion to strike out the answer of the witness is overruled; exception for the defendant.

Q. Do you recall the circumstance of the plaintiff Burtch being hurt at Commiskey last October?

A. Yes, sir.

Q. To whom, if you know, was that ins-lage cutter consigned?

A. To me.

Q. You were dealing in those things as well as others?

A. Yes, sir.

Q. From where did you obtain it?

A. Through an Indianapolis concern but it was shipped from a warehouse in Louisville.

Q. Do you know what its weight would be in the crate?

A. No, I don't remember what the weight was.

Q. Had you bought another and had it shipped in shortly before this?

A. Right before or afterwards. I don't remember whether it was before or afterwards. Just a few weeks apart.

Q. What sort of a platform was maintained by the defendant on the 24th of last October?

A. Brick platform along the main track.

Q. And that is on which side of the main track?

A. On the west side of the main track, right along the depot.

Q. Immediately east of the main track, what do you find?

A. Side track and ground, no platform there.

Q. There is a side track there?

A. Yes, sir.

106 Q. What other track, if any, is there?

A. A little spurr track.

Q. Over beyond that is the natural earth, a wagon track?

A. Yes, sir.

Q. Is there any other platform besides the brick one that you mentioned?

A. No, sir.

Q. Were you present at the time this ins-lage cutter came into Commiskey?

A. I was over there just as the- pulled in but I went back to the store and did not help unload it.

Q. Was there any reason within your knowledge why it might not have been unloaded on the main platform?

A. The local freight side tracked to let a passenger train by. They unloaded it over there to save time.

Q. After this train had gone by, it might have been put on the main track and unloaded from there?

A. Yes, sir.

Q. Was there anything to have prevented them from putting this freight car on the stub switch and unloading this cutter to the east?

A. They could have done that, I guess. I don't know any reason why they didn't.

Q. Did you see the plaintiff after he was hurt?

A. Yes, sir.

Q. What was his condition at the time you saw him?

A. Seemed to be very badly hurt. He was in the depot and you could just barely understand a few words that he said.

Q. Was a physician called?

A. Yes, sir.

Q. You did not see any *apr*t of the transaction when he was hurt?

A. No, sir. I did not see any of that.

107 Q. What, if any kind, of skids does the company have at that time to assist in unloading?

A. They have barr*le* skids. Ordinary heavy barrel skids.

Q. How long are those barre*ll* skids?

A. I judge they are five or s*e*x feet long.

Q. Was Burtch there that day when you were there before the injury?

A. I don't know. I did not see him.

Q. You went on home to your business and allowed some of the others to unload the cutter?

A. Yes, sir.

Q. Who did it belong to?

A. There was four or five interested in it. I sold it to a company of farmers.

Q. Was Burtch one of them?

A. Yes, sir.

Q. They were looking for it on that train?

A. Yes, sir.

Q. But the bill of lading was made out to you?

A. Yes, sir.

Q. From Louisville?

A. Yes, sir.

Q. To Commiskey?

A. Yes, sir.

Cross-examination.

By H. McMullen, Att'y for the defendant:

108 Q. The company so far as you know had no knowledge of the purchase from you of the *insalage* cutter?

A. No, sir.

Q. And these purchasers had no knowledge when the cutter would arrive except that they were anxious to get it as soon as possible.

A. They could not tell when it would arrive.

A. As a matter of fact that train was late, wasn't it?

A. Very late. I think it was several hours late.

RAY MOPPIN, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery, Att'y for the plaintiff:

Q. State your name to the jury.

A. Ray Moppin.

Q. Where do you live?

A. Commiskey.

Q. What is your occupation?

A. Farmer.

Q. Were you at the station of Commiskey on the afternoon of October 24th last?

A. Yes, sir.

Q. Do you remember about what time the local freight got in from the south?

A. I think about four o'clock. I am not sure about the time.

Q. Do you know Mr. Jackson, the conductor in charge of that train?

A. I know him when I see him.

Q. Was he on the train that day?

A. Yes, sir.

109 Q. Do you recall that an *ins*-lage cutter was a part of the freight that afternoon?

A. Yes, sir.

Q. Did you see Mr. Burtch, the plaintiff, there at that time?

A. Yes, sir.

Q. Tell the jury what, if anything, you heard Jackson, the conductor say with reference to wanting help in unloading the freight?

A. Jackson came up there and wanted to know what all the men were standing there for and they said they were after the *ins*-lage cutter and he said come on back and help unload it then.

Q. Did any of them start to help under that request?

A. Yes, sir. All but three of them.

Q. Did Burtch go?

A. Yes, sir.
Q. Who else?
A. I don't remember just who all did go. There was five or six tho'.
Q. Where did you go?
A. I went around to my team.
Q. You were not there when the accident happened?
A. No, sir.

The defendant did not cross examine this witness.

110 S. TINCHER MOPPIN, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomry, att'y for the plaintiff:

Q. State your name to the jury.
A. S. Tincher Moppin.
Q. Where do you live?
A. About three and a half miles east of Commiskey.
Q. What is your occupation?
A. Farming.
Q. Were you at Commiskey at the station on the afternoon of Oct. 24th?
A. I would not be positive about the date. It was about that time.
Q. Was it the afternoon that Burtch was hurt?
A. Yes, sir.
Q. Do you know Jackson, the conductor of that train?
A. I don't know him. I have seen him but an not personally acquainted.
Q. You know him when you see him?
A. Generally.
Q. Did you see him that afternoon?
A. Yes, sir.
Q. Did you see the plaintiff Guerney O. Burtch about the platform?
A. Yes, sir.
Q. What if any request did you hear Mr. Jackson, the conductor make for help in unloading the freight?
A. There was about five os us standing on the platform. Jackson walked up to the platform and wanted to know waht the bunch was standing there for and some man made the remark that we were there for an ins-lage cutter and he said, come on and help us unload it.

111 Q. Who went, if anyone, in response?
A. Burtch and I and a man by the name of Arbuckle.
Q. Did you continue helping until it was fully unloaded?
A. I only helped unload part.
Q. Were you there when Burtch was hurt?

A. No, sir.
Q. You did not see any part of the accident?
A. No, sir.

GRANVILLE ARBUCKLE, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. State your name to the jury.
A. Granville Arbuckle.
Q. Where do you live?
A. Paris Crossing.
Q. What is your occupation?
Q. Clerk.
Q. Were you at the station at Commiskey on the afternoon of last October, the 24th?
A. I believe that was the day I was there.
Q. Do you recall whether the local freight train came in on schedule time that day or not?
A. I think not.
Q. Now much was it late?
A. I don't exactly remember.
Q. Were you over at the station after it came in?
A. Yes, sir.
112 Q. Who else was there?
A. I don't remember who was there.
Q. Do you remember of Guerney O. Burtch being there?
A. Yes, sir.
Q. On which track was the local freight train placed?
A. On the side track.
Q. Was that track east of the main track?
Q. Yes, sir.
Q. Who was in charge of the train that day as conductor?
A. Ed Jackson.
Q. The platform is west of the main track at that station?
A. Yes, sir.
Q. What if any request did Jackson make for help that day in unloading freight.
A. I understood him to say, "give us a lift, to unload the cutter, it is heavy." I don't remember the exact words he used.
Q. To whom did he direct those words?
A. I could not say. Just to the crowd.
Q. Did it include you and Burtch and the others?
A. We were there and he spoke to all of us.
Q. In what direction was he walking?
A. I don't know. We were standing on the platform and he came up.
Q. He said to come give them a left or something to that effect?

A. Yes, sir.
Q. What did you do?
A. We started to help unload.
Q. Who preceeded to help unload?
A. Guerney.
113 Q. Guerney Burtch, the plaintiff?
A. Yes, sir.
Q. Who else?
A. Everett Arbuckle and I think Moppin helped carry some of the light stuff across the platform.
Q. Where was the light stuff with reference to the door of the car and the ins-lage cutter.
A. I was not in the car, I could not say.
Q. What was done by way of unloading the ins-lage cutter?
A. I could not say. There were several in there who helped to life it up to the door and put it on the ends of the timbers.
Q. What timbers?
A. The timbers they had to slide it out on. They used them in place of skids.
Q. Do you know where those timbers came from?
A. Yes, sir.
Q. Where?
A. Over at the mill. Right across the track from the depot.
Q. How did they come to be brought and used in that character?
A. Jackson spoke about getting some heavy pieces to run it out on in place of running it out on the skids as the skids were short.
Q. What did he say?
A. He said to get some heavy timbers to slip it out on.
Q. What was done in response to that request?
A. We got them at the mill.
Q. Guerney Burtch and you?
A. Yes, sir.
Q. What kind of timber did you get?
A. I judge 2x6 or something like that.
114 Q. Was it green or seasoned?
A. Well it had just been sawed two or three days.
Q. Fresh sawed?
A. Yes, sir.
Q. How were these planks or skids placed?
A. One end was placed in the car door and the other end on the ground.
Q. What examination was made by Jackson when you brought these up as to whether they were strong or safe and sound.
A. I could not say whether there was any or not.
Q. You did not see him make any?
A. No, sir.
Q. What support did you put under them to help sustain them?
A. Did not put any.
Q. They ran from the car door and extended in what direction?
A. East.
Q. In extending east, what was beneath them, any other track?
A. Yes, sir.

Q. What was it?
A. The side track.
Q. Was there any reason that you know of why this car could not have been put on the stub switch?
A. No, sir. There was another train due.
Q. Over on the stub switch?
A. I don't know that there was.
Q. After the passenger train went by was there any reason why this car might not have been placed on the main track next to the platform?
A. Not that I know of.
115 Q. What was done with ins-lage cutter?
A. It was slid to the door and then put on these pieces of plank.
Q. You sort of slid it down?
A. Yes, sir.
Q. Then what happened?
A. One of the timbers broke and the cutter fell over on Mr. Burtch.
Q. Could you see where it got him, what part of the body?
A. When it dropped, it mashed him right down.
Q. Was he pinned under the cutter when it crushed him down?
A. Yes, sir.
Q. How did you get him out?
A. Three or four of the fellows got hold of the cutter and lifted it up and another fellow dragged him out.
Q. What was his condition at that time?
A. He was in an awful bad shape.
Q. Was he conscious then or not?
A. Yes, sir.
Q. What did you do for him?
A. They carried him around to the depot and put him in there and then called a doctor.
Q. Did you call more than one doctor?
A. Well, they called Dr. Mathews and he wasn't in so they called Dr. Robertson at Deputy.
Q. In the meantime Mathews came and got there before Robertson got there?
A. Yes, sir.
Q. Did the company, so far as you know, have any other skids or apparatus to assist in unloading this ins-lage cutter?
A. Just the barrel skids is all I know of.

116 Cross-examination.

By Harry McMullen, Att'*s* for the plaintiff:

Q. This car that the cutter was in, was that right opposite you folks when they pulled in there that night?
A. I don't believe it was quite up to *su*.
Q. It is a short local freight train of twelve or fifteen cars?
A. I judge it was.

Q. About what time of day was it?
A. I judge about four o'clock.
Q. Still day light?
A. Yes, sir.
Q. Then the conductor came up along the train where a crowd of you men were standing and said to give them a lift?
A. Yes, sir.
Q. Did he mention the *ins*-lage cutter at that time?
A. I believe something was said about the *ins*-lage cutter by someone around there.
Q. Anyways he said for the crowd to give him a lift?
A. Yes, sir.
Q. The car was at that time on which track, side or main?
A. On the side track.
Q. The main track was between you folks and the car?
A. Yes, sir.
Q. Then they opened up the door of the car and you went to carrying things out?
A. Yes, sir.
Q. Did Burtch get to the car at any time, do you know?
A. I think he got in the car, maybe.
117 Q. He was in there helping the train men move it up to the door?
A. I could not say who was in there. Possibly him.
Q. He was in there helping move the *ins*-lage cutter?
A. I could *nto* say as to that. He was in there helping move some of the small stuff.
Q. How did they get the cutter to the door?
A. I could not say, I was not in there.
Q. Did you see them?
A. Saw them moving it after they were very near the door.
Q. How were they moving it?
A. Pulling it.
Q. Didn't they have any rollers?
A. Not that I remember of.
Q. Who was it said something about getting the skids and then Jackson said, what was that?
A. I don't know who it was but someone said something about getting skids and Jackson said to get some timbers.
Q. What he said was in response to what somebody else had said?
A. That is the way I understood it.
Q. As soon as Jackson said to get some timbers, you two started off?
A. Yes, sir.
Q. Was anything said about what kind of timber to get by anybody?
A. Not that I remember of.
Q. But you went over to get some thick timber?
A. Yes, sir.
Q. Your business is farming?
A. Was at that time.

118 Q. What has been your business during life?
A. Farming most of my life.
Q. Did you ever work in a saw mill?
A. A little.
Q. As a farmer you have been used to handling timber?
A. Yes, sir.
Q. And used to handling heavy stuff at different times?
A. Yes, sir.
Q. And you and Burtch went over there to get timber that you thought would be heavy enough to hold it?
A. Yes, sir.
Q. And that is what you thought you got when you were bringing them over to the car?
A. We got as good as we could find.
Q. This was freshly sawed timber?
A. Been sawed three or four days.
Q. About how big did you say it was?
A. 2 x 5-6. I would not say, possibly 2 x 6.
Q. About how long?
A. I think it was 14 or 16 feet long.
Q. When you brought the timber to the car, what did you do with it?
A. We brought them over and I don't know whether we laid them on the car or whether someone else did.
Q. You and Burtch and maybe someone else helped to put them in the car door?
A. Yes, sir.
Q. By that time you had gotten on the other side of the train?
A. Yes, sir.
119 Q. Did you walk around the train or was it cut into?
A. I think we climbed through the cars.
Q. You and Burtch with your timber?
A. No, sir.
Q. How was that?
A. The timber was on the east side of the car when we got them.
Q. The saw mill was over on the east side?
A. Yes, sir.
Q. After you and Burtch brought them, you don't know whether you and he alone or whether you were assisted in putting them into the car?
A. No, sir. I don't know.
Q. Then what *what* was done?
A. They began to lift it out on them.
Q. You and the plaintiff stood right where you were while they lifted it onto the skids?
A. Yes, sir.
Q. You were on which side?
A. Toward Cincinnati.
Q. Burtch was toward Louisville?
A. Right on the same side I was.
Q. Then he had left the plank he had brought, or how was that?

A. I don't know how it was.
Q. You don't know whether you left your side or whether he left his side?
A. No, sir. I don't remember.
Q. Then as soon as you had put these timbers up was there anything more said about it, as you know of?
A. I don't remember anything else.
120 Q. Were you standing between Burtch and the car?
A. Yes, sir.
Q. It went on down how far before it broke?
A. I expect it was down eight or nine feet.
Q. That was possibly half way down?
A. Yes, sir.
Q. It was getting pretty close to the ground?
A. Yes, sir.
Q. In your judgment, how many more feet did it have to go?
A. I judge five or six feet further.
Q. Then it had gone something like two-thirds of the way down?
A. Perhaps.
Q. The lower ends of these timbers were placed on what?
A. On the ground.
Q. Were these taken beyond the suprr track?
A. I think they went over the spurr track.
Q. That is real high ground where the wagon track is?
A. It is a little higher than the other I judge.
Q. And the other men that were helping, were they farmers in the same locality with you and Burtch?
A. Yes, sir.
Q. Was Mopin in there at that time?
A. I don't think he was.
Q. Were you interested in this *ins-lage* cutter in any way?
A. No, sir.
Q. Do you know whether Arbuckle and Burtch were or not?
A. Yes, sir. They were.

121 EVERETT ARBUCKLE, being duly sworn to testify the truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery:

Q. State your name to the jury.
A. Everett Arbuckle.
Q. Where do you live?
A. About three fourths of a mile west of Commiskey.
Q. What is your occupation?
A. Farming.
Q. Were you over at the Commiskey Station in the afternoon of Oct. 24?
A. Yes, sir.
Q. Did you assist in unloading an *ins-lage* cutter?

A. Yes, sir.

Q. What if anything did you hear Jackson say about getting some plank or skids to unload it with?

A. I don't remember just exactly what was said. Someone said something about getting some heavy timber to unload it or get it out on and two of them went and got them.

Q. Who went and got them?

A. Guerney Burtch and Granville Arbuckle.

Q. Where did they get them?

A. From the saw Mill.

Q. How far is that saw mill away?

A. Not very far. It is the log yards and is right along the railroad.

Q. Not very far from where the car was?

A. No, sir.

Q. When they were brought back, what if any examination did Jackson make to test their strength?

A. I did not notice him make any.

122 Q. What did he say about that being sufficient?

A. I don't know as I heard him say anything.

Q. What if any support did he put under them to hold them up?

A. Nothing. There was nothing put under the pieces that the cutter was taken out on.

Q. Did you make any effort to place some support under the plank?

A. There was something said about it and I said something about putting the railroad skids up edge ways under the plank and they were brought around but they did not put them under the plank.

Q. That was the barrel skids?

A. Yes, sir.

Q. What was your judgment about the pieces being strong enough?

A. I did not think much about it. Still I wondered if they would hold it as the machine was terribly heavy.

Q. Anyway there was no support under them when they broke?

A. No, sir.

Q. What kind of timber were these skids made of?

A. I think they were popular. I could not say for certain but I think they were popular.

Q. Green or seasoned?

A. Green I suppose. They did not look as Though they had been cut very long.

Q. Would those barrel skids you mentioned have reached from the car to the ground over the stub switch?

A. No, sir.

Q. Would the barrel skids have reached from the car to the brick platform if the car had been put on the main track?

—. I suppose they would have.

123 Q. Would the barrel skids have reached from the door of the car to the ground if the car had been put on the stub switch?

A. Yes, they would have reached it but it would have been a little steep to tackle that heavy machine.

Q. Was there any reason that you know of why the *ins-lage* cutter could not have been unloaded on the platform?

A. No, sir.

Cross-examination.

By Harry McMullen, Att'y for the defendant:

Q. This barrel skid would have reached from the door of the car down to the tie on the stub switch, would it not?

A. It would have reached to something like the middle of the track.

Q. Would it have been a little steep?

A. Yes, sir.

Q. Rather steep?

A. Yes, sir. It would have been rather steep.

Q. The ground where you had these boards was higher than the ground at the platform, wasn't it?

A. The ground was something alike.

Q. About how high is the platform above the tie?

A. Something like twelve inches.

Q. About how high above the rail?

A. I don't know just how high it is.

Q. The only difference in using the skids on the main platform would be that little difference between the heighth of the cross ties and the platform?

A. If it was on the p-atform, it would throw it a little higher.

Q. Make it a little easier?

A. Yes, sir.

124 Q. As a matter of fact, wasn't those skids used first up there on that day on the stub track and wasn't there some danger of getting to- far north in using them, isn't that the reason why you put the boards up there?

A. No, sir. No, sir.

Q. Were you there that day when the conductor came along?

A. Yes, sir.

Q. Were you interested in the machine?

A. Yes, sir.

Q. Up there for that purpose?

A. We went there that afternoon to see if it came.

Q. You knew it was coming on that train?

A. No, sir. We were looking for it a day or two before that.

Q. You got word?

A. No, sir. I did not know anything about it.

Q. After you got to Commiskey and before the train got there, didn't you know that it was on that freight train?

A. No, sir. I did not.

Q. When the train came in they found that it was in the car?

A. Yes, sir.

Q. Who was it mentioned that you had better get some heavy timber?

A. I don't remember.

Q. As Jackson came along you men were all standing there in a crowd?

A. Yes, sir.

Q. Did you hear Jackson say anything?

A. Yes, I heard him say something but I don't remember the exact words.

Q. Then you men talked about getting some heavy skids?

A. I suppose there was something said about it.

125 Q. Did Jackson say something about getting the skids first?

A. Yes, I think Jackson said something about getting timber or long *long* skids.

Q. Was he the first one that mentioned it?

A. I think he was the first one that mentioned it because it had to go across the stub switch to get it on the dirt.

Q. How did he say that? What did he say?

A. I don't remember just how he said it.

Q. Said better get some heavy timber or what?

A. He said something about getting some heavy skids to roll it out on.

Q. Just said that to the crowd in general?

A. I suppose so.

Q. Who got the skids?

A. Arbuckle and Guerney Burtch.

Q. What did they do with the skids?

A. Brought them back and put them in the door.

Q. Who put them in the door?

A. I don't know now.

Q. Where was the company's skids?

A. I think they were standing on the side there by the car.

Q. Did anyone say anything about using them for support?

A. They were laying on the ground after that and I said something about setting them up edgeways for support and pulled one around and straightened it around with my foot. Then someone pulled it out of the way.

Q. Who pulled it out of the way?

A. I don't know now.

126 Q. What size timber was there in the skids?

A. Something like 5 x 6. They were rather heavy.

Q. Rather heavy stuff?

A. Yes, sir.

Q. That is the company skids you are talking about?

A. No, the skids they went and got.

Q. The skids that belonged to the company were about what size?

A. I don't know. They were something like barrel skids.

Q. About 2 x 4?

A. I don't know.

Q. Now these timbers that you put there, could you see anything wrong with them?

A. I don't know that I noticed them. I was in the car and I helped put the machine out.
Q. The machine got about half way down before it broke?
A. I suppose the middle or something like that.
Q. About what position?
A. Well, the lower end was about half way down or something like that.
Q. The biggest strain had been over with?
A. I suppose the biggest strain would be when it was something near the middle.
Q. Who was in the car with you?
A. Some of the railroad men and myself.
Q. How heavy was this machine?
A. Something like 1,500 pounds or something like that.
Q. Was Burtch in the car?
A. I believe he was.
127 Q. After they got the skids Burtch got in the car?
A. He got in the car and helped to roll the machine out and get it on the skids.
Q. The machine was setting there in the door when the skids were put up there.
A. Yes, sir.
Q. Do you know who put the skids up there?
A. No, sir.
Q. Then they broke?
A. One skid broke. The north one.

Mr. G. F. ARTZ, being duly — to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. State your name to the jury.
A. G. F. Artz.
Q. Where do you live?
A. One mile east of Commiskey.
Q. You lived out there last fall?
A. Yes, sir.
Q. Do you recall the incident of an ins-lage cutter coming to that station last fall?
A. Yes, sir. I heard of it.
Q. What is the fact about the conductor of the train on which it came in on, calling for help from bystanders?
A. I was not there. I could not say anything about that.
128 Q. Did you get a cutter of your own at any time?
A. Two year- ago.
Q. Were you there at the time it was unloaded?
A. Yes, sir.
Q. What was done by the conductor by way of calling for help?

The defendant objects to the question because it has no bearing n this case. He is asking about something that happened at some ther time and some other place.

The court overruled the objection, exception for the defendant.

A. I was there at the time and conductor Jackson said, "come n and give us a lift".

Q. State whether or not you did help in that case?

A. Yes, sir.

Mrs. GUERNEY O. BURTCH, being duly sworn to testify the truth, he whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery, att'y for the plaintiff:

Q. State your name to the jury.

A. Lula Burtch.

Q. What relation are you to the plaintiff, Guerney O. Burtch?

A. His wife.

Q. How long have you been married?

A. Four years last December.

29 Q. What if any children do you have?

A. Two children.

Q. Girls or boys?

A. A girl and a boy.

Q. How old is the girl?

A. Three years old.

Q. How old is the boy?

A. Three months old.

Q. The boy was born since your busband was hurt?

A. Yes, sir.

Q. What was the date of the accident?

A. 24th of last October.

Q. What was his business and occupation at that time?

A. Farmer.

Q. What had been the condition of his health before that time?

A. Strong and well.

Q. You own a little farm near Commiskey?

A. Yes, sir.

Q. About what time in the evening was he brought home?

A. I don't remember exactly. It was after dark.

Q. What was his condition at that time as near as you can de- ribe it?

A. He was suffering great pain and was as helpless as a baby.

Q. Could you determine the nature of his injuries or where he as hurt?

A. Only by the way he complained and his suffering and pain.

Q. What was done if anything to relieve his pain?

A. I gave him tablets every two hours.

Q. How many days did you continue giving him tablets?

A. Must have been about two weeks.

130 Q. What was his condition as to being able to help himself in bed?

A. He was not able to move, only his arms.

Q. Did you have any help in taking care of him?

A. Yes, sir.

Q. Who did you have?

A. My sister.

Q. How long did she stay with you for that purpose?

A. From the 26th of October until the last day of March.

Q. How long was your husband confined to his bed?

A. He wasn't out of the house from the 24th of October until the last of February.

Q. Do you know about the condition of his bladder? By what means he removed the water?

A. It had to be drawn with a catheter.

Q. How often did he have to use that instrument?

A. About four or five times a day.

Q. What was the condition of his bowels?

A. He had no control.

Q. And that is the same yet?

A. Yes, sir.

Q. What annoyance did they give you while he was in bed?

A. He had to be taken care of just like a baby, day and night.

Q. It is true that his bowels are still in the same condition?

A. Yes, sir.

Q. Could you tell whether he had any sense of feeling in his legs or feet?

A. He had some feeling in his left one.

131 Q. Has he been able to give any attention to the work on his farm since he was hurt?

A. No, sir.

Q. For how long did he continue to complain of pain?

A. He does yet.

Q. Do you have any other help to take care of hi- besides yourself?

A. Not now.

Q. Did you have any other doctor than Dr. Mathews?

A. No, sir.

No cross examination by H. McMullen, Att'y for the defendant.

GUERNEY O. BURTCH, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery:

Q. State your name to the jury.

A. Guerney O. Burtch.

Q. Where do you live?

A. About a quarter of a mile right west of Commiskey.
Q. What is your occupation?
A. I was a farmer until I got hurt. I haven't done anything since.
Q. How long have you been engaged in farming?
A. All my life. Ever since I was big enough to work.
Q. You own a little farm by Commiskey?
A. A small farm. Yes, sir.
132 Q. What was the condition of your health previous to October 24, 1917?
A. I was able to work and take care of my farm and support my wife and children.
Q. You have two children?
A. Yes, sir.
Q. Your little boy was born since you were hurt?
A. Yes, sir.
Q. Were you over at Commiskey on the afternoon of the 24th of last October?
A. Yes, sir.
Q. Were you there at the time a local freight train came in from the South?
A. Yes, sir.
Q. About what time did it arrive?
A. About four o'clock.
Q. Do you know what time it was due?
A. Between 12 and 1 o'clock. I would not say exactly for I do not know.
Q. Were you there at the station when it came in?
A. Yes, sir. Right there on the platform.
Q. What kind of a platform does the company have there?
A. Brick platform.
Q. About how high is it?
A. Ten or twelve or might have been fourteen inches. Something like that though.
Q. When the train came did you learn that it was carrying the ins-lage cutter?
A. Yes, sir.
133 Q. Did you know that it had the cutter on it before it got there?
A. Not until we got to Commiskey.
Q. Did you know Ed. Jackson, the conductor of the train?
A. Yes, sir.
Q. Was he in charge of the train that day?
A. Yes, sir.
Q. What if anything did he say to you or to you and others about helping him unload that cutter?
A. The train pulled in and someone said something about the cutter being on the train and he said "Come on and give us a lift, it is heavy."
Q. To whom did he direct that?

A. There was Arbuckle and Everett Moppin and Ray Moppin and myself standing on the platform there in a little bunch.

Q. Who if any of you, went in response to that request?

A. All, except Ray Moppin.

Q. Where was the car in which the cutter was at that time?

A. On the side track about opposite the platform.

Q. When you went, to what point did you go?

A. There was some little stuff that had to be unloaded that was in the way and that was carried across the main track and I was in the car and helped to ha-d that out.

Q. After that was gotten out of the way, what did you do then?

A. They had a pinch bar and two little rollers about ten or twelve inches long and they pried the crate up and put the rollers under it and rolled or pushed it up toward the door.

Q. When they got it to the door, what if anything else did Jackson the conductor say?

A. Said we would have to have some plank that would reach across the stub switch.

134 Q. Was there any reason or cause if you know, why could not have been unloaded on the platform?

A. No, sir. Not that I know of.

Q. What if any skids or apparatus did the company have there with which to unload the ins-lage cutter?

A. Nothing except the ordinary skids. Barrell skids I believe is what they call them.

Q. State whether or not they were long enough to carry the cutter across the track.

A. They were not. That was why Jackson wanted the plank.

Q. What did he say about the heavy plank?

A. He said "We will have to have some heavy plank and said to go over and get some.

Q. Where did he mean for you to go?

A. He pointed toward the saw mill.

Q. Was the saw mill near by?

A. Yes, sir.

Q. Who went over there after these planks?

A. Granville Arbuckle and myself.

Q. What did you get?

A. We got two pieces, if I remember right, they were ten or twelve feet long and 3½ x 5 inches thick. I don't remember just exactly.

Q. What did you do with them?

A. Took them to the car and put one end in the car and the other across the stub switch. The one end laid east of the stub switch.

Q. What examination did Jackson make at that time to ascertain whether or not they were sound or otherwise strong enough to support the — of the machine?

135 A. He looked at them and kind of tested them and worked his foot up and down to see and said they would hold.

Q. Is that all the examination he gave them?

A. That is all.

Q. Said they would hold it up?
A. Yes, sir.
Q. What if any proper support did they put under them?
A. Everett Arbuckle wanted or did put one of the barrel skids under there and wanted someone else to take the other end and put it on edge to support the plank but they said no, that they did not need it.
Q. The ins-lage cutter was then moved out on the plank?
A. Yes, sir.
Q. Go on and tell what was done next.
A. I had hold of the crate in which this cutter was crated and was easing it down as best we could and got it about two thirds of the way down when the skid broke and cought me and crushed me down.
Q. How were you working at the time, easily or otherwise?
A. There was no rough treatment. We were just letting it down easy as we could. There was no jerking of any kind.
Q. How far was it going?
A. It was very slow. We were very easy with it for one man could not have pulled anything like that by himself.
Q. It crushed you down to the ground?
A. Yes, sir.
Q. How many brakemen or other helpers of the train crew were there besides Jackson?
A. Three brakemen.
Q. Were they helping?
A. They were around the cutter, supposed to be. They were all right there by the crate.
136 Q. Was that all of the train crew?
A. That was all that was there. Jackson and the three brakemen that I remember anything about. The engineer and the fireman were some place else. Not there anyway.
Q. This track referred to as the stub switch is connected with the main track at both ends?
A. I think it is.
Q. Was there any reason there that day why this car in which the ins-lage cutter was, could not have been set over on the stub switch.
A. Plenty of room over there for eight or ten cars.
Q. You may state how that would have effected or eliminated the danger of unloading the ins-lage cutter if the car had been placed over there.
A. Might have been possible for them to use their own skids for the — over there is about as high as the platform.
Q. Did Jackson give any reason why he did not unload it on the platform?
A. No, sir.
Q. Do you know where articles of freight were usually unloaded at that station?
A. I have seen them unload different things on the platform. That is articles of freight.

Q. What was done after you were hurt?

A. I remember hearing Jackson say "Lift, men, lift" and some of them took hold of the crate and lifted it off of me and another man pulled me out from under it.

Q. Then where were you taken?

A. They laid me on the ground and then carried me to the depot.

137 Q. How long was it before a doctor came?

A. Not very long. Probably a half hour. Maybe not so long. I hardly knew I was suffering so badly.

Q. What was your condition as to suffering with pain?

A. Very severe.

Q. Where did you hurt?

A. My ribs were fractured or broken and my back hurt me so that I could not be still or lay still and I could not move, I hurt so bad.

Q. When the doctor came did he administer to you in any way?

A. He gave me some kind of medicine to quiet my pain. I don't know what it was and he injected morphine or something like that in my arm.

Q. Then where were you taken?

A. They placed me on a cot and took me home.

Q. What time did you get home?

A. It was a little after dark.

Q. What physicians attended you?

A. Dr. Robertson and Dr. Mathews went home with me.

Q. Dr. Robertson is the company doctor at Deputy?

A. That is my understanding.

Q. He was not called by you?

A. No, sir.

Q. How long did Dr. Mathews continue to look after your condition?

A. I could not say exactly. Two or three months I suppose.

Q. How long were you confined to you- home before you got out?

A. From the 24th of last October until between the 20th and the last of February.

138 Q. How long did this intense pain continue?

A. The severe pain lasted two or three weeks.

Q. How did that effect your ability to sleep or rest?

A. I could not be still to sleep or anything else. I could not turn for a while unless someone turned me and I would want to be turned thinking I would get easier and then it was just the same thing over again. I could not rest anyway I laid.

Q. What was the condition of your right leg immediately after the injury?

A. I could not move it at all.

Q. What was the condition of your left leg?

A. I could not move it very much. Just slightly.

Q. You could move it?

A. Just a little bit.

Q. What if any feeling did you have in the left leg?

A. Very little below the knee.

Q. What was the condition of your bladder?
A. My bladder seemed to be paralyzed and my urin- had to be drawn all of the time.
Q. Does that condition continue yet?
A. Yes, sir.
Q. How often each day do you have to remove the water that way?
A. Five or six times. Something like that.
Q. What was the condition of your bowels?
A. They have been paralyzed all of this time.
Q. What control do you have over their action?
A. None.
139 Q. What feeling or sensib-lity do you have in the lower organs of your body?
A. None.
Q. When did you begin going out on crutches?
A. I used crutches probably along the middle of February, I began to learn to use them then.
Q. Do you have any feeling now in your left foot or leg?
A. My left leg has better action.
Q. The feeling has improved in that one?
A. Not in the foot.
Q. What about your right leg, do you have better action in that?
A. Slightly. It has never regained its size.
Q. It has shrunken?
A. Quite a bit.
Q. Have you been taking treatment of anyone with a view of improving your condition?
A. Yes, from an osteopath.
Q. What doctor?
A. Dr. Morrell of Columbus.
Q. How old are you?
A. Thirty-two my last birthday in February.
Q. What day?
A. Twelvth.
Q. What work have you been able to do since you were hurt?
A. None whatever.
Q. Can you state what amount of expense you are out for medical attention since you have been hurt?
A. No, sir. I could not state the exact amount. Something like two — three hundred dollars I suppose.
140 Q. Do you suffer any pain at this time?
A. Yes, sir.
Q. Where is that?
A. In my back and different parts of my body.
Q. Are you able to wait upon yourself and administer to yourself without help?
A. It just depends. I am able to draw my urine myself.
Q. This ins-lage cutter that you spoke of was bought by Mr. Lurton?
A. Yes, sir.

Q. And what interest were you to have in it after it was delivered to him?
A. One seventh.
Q. Had you expected to use it as soon as it came?
A. Yes, we had been looking for it for two weeks.
Q. Do you know about what that ins-lage cutter would weigh?
A. 18-2,000 pounds or something like that.

Cross-examination.

By H. McMullen, att'y for the def.:

Q. You went to Commiskey that day to get an ins-lage cutter?
A. I did not know it was there until I got there.
Q. There you learned that it was to be on that train?
A. D. M. Green informed me that it was on that train.
Q. Who first started the talking there between you and Jackson?
A. I could not tell you who it was.
Q. Do you remember whether someone asked whether the cutter was there or not?
A. Someone did I think.
141 Q. Then Jackson said that it was heavy and for you to give him a lift?
A. Yes, sir.
Q. At that time the train was over on the side track?
A. Passing track or switch they call it.
Q. The middle track?
A. Yes, sir.
Q. Was the car about opposite the depot?
A. I think just a little bit south.
Q. Then as soon as he said "Give us a lift" you went over to the car?
A. Yes, sir.
Q. Who got to the car first?
A. I believe I did.
Q. Some of the brakemen were there to-?
A. If I remember right they were.
Q. Then you started to putting things out of the car onto the platform?
A. Yes, sir.
Q. Did you use the company skids on that side that day?
A. I think we did for there was two or three barrels of vinegar.
Q. It is about the same distance from the main track over to the passing track as it is from the passing track to the stub switch?
A. Ordinary space between the tracks.
Q. Did you use the company skids to take out those barrels?
A. Yes, we used them but you understand they did not reach to the platform.
Q. Not quite long enough for that?
A. No, sir.
142 Q. They reached about to the rail?
A. I suppose over the rail in the main track.

Q. Afterwards when the skids were placed on the north side they reached to the spurr rail, did they?
A. They reached the same distance on either side.
Q. They reached one way as far as they did the other?
A. Sure.
Q. Did you help move the ins-lage cutter while you were in the car?
A. Yes, sir.
Q. You were pinching it along?
A. I don't think I used the pinch bar. I had hold of the crate and somebody else was doing that.
Q. You *a* saw them pinch it along?
A. Yes, sir.
Q. Why didn't you take and pry it along without the rollers?
A. It was too heavy.
Q. You knew it was pretty heavy when you were in the car?
A. It laid on the floor pretty close.
Q. Who first mentioned the skids, that you would have to get some other skids?
A. Mr. Jackson if I remember right.
Q. What is your best recollection?
A. That it was Jackson.
Q. Is there a fan on that cutter?
A. What they call a blower or fan.
Q. Did that stick outside the crate?
A. I don't remember whether it did or not.
143 Q. From what you know of the cutter and the way they are made what would you say of the size of it?
A. I don't know exactly but I judge it was 45 inches across. That is just a guess.
Q. Was there anything said there that about the possib-lity of the fan being bent in any way?
A. I don't remember about it.
Q. Do you remember Jackson saying that the fan might get injured?
A. No, sir.
Q. You don't remember about that?
A. No, sir. I don't remember saying anything about it.
Q. When did you go get the skids? After the cutter was up to the door or while they were moving it up?
A. After it was up to the door.
Q. Then it is your recollection that Jackson said we will have to have some heavy skids?
A. Yes, sir.
Q. The company's skids were already there on the car door over the spurr track?
A. They did not reach across the spurr track.
Q. Did you say they reached the far rail on the main track?
A. No, sir.
Q. If they reached the far rail on the main track, they would reach the rail on the stub switch, wouldn't they?

A. I don't remember that they touch the far rail though.
Q. You meant they reached the rail nearest the passing track?
A. The first rail would be next to the switch.
144 Q. In other words you meant to say that you used them that way to take the barrels out of the car?
Q. Yes, they used them to take the barrels out on the west side.
Q. In other words when you used those company skids that day when you were unloading toward the platform, one end rested on the car and the other rested on the far rail?
Q. No, sir. I don't remember that it reached to the far rail.
Q. Did you not state that they would not reach to the platform but did reach to the rail?
A. I did not understand which rail you meant.
Q. That is about two feet away from the edge of the car?
A. Farther than that.
Q. How far is it?
A. Three or four feet.
Q. The company skids reached from the car about three or four feet out?
Q. Yes, and maybe more.
Q. The track is four feet, eight and a half inches wide?
A. I don't know anything about it.
Q. Going back to the other side of the car, the company skids were over there before you went for the *blank*?
A. I believe they were.
Q. Do you know who put them there?
A. No, sir.
Q. They reached out toward the east?
A. Yes, but *i* don't know who put them there or how far they went out.
Q. At that time the cutter was there near the door ready to be unloaded?
A. Yes, I rather think it was.
145 —. Do you remember that anyone said anything about the fan at that time?
A. No, sir.
Q. Then it was Jackson that said that they would have to have some heavy skids?
A. Yes, sir.
Q. Did he just say that to the crowd?
A. He said he would have to have some heavy skids and turned to Arbuckle and I and we went and got them.
Q. The rest of the men that had been helping were around there?
A. Yes, sir.
Q. Then you and Arbuckle went over to the saw mill and got some plank?
A. Yes, sir.
Q. What kind of material did you get?
A. Poplar.
Q. Was it dried or seasoned?
A. No, sir.

Q. Green or just cut?
A. It had not been cut more than a day or two.
Q. This was about what size?
Q. Three and a half by ten or twelve feet long.
Q. How far did they reach?
A. Far enough to reach to the bank.
Q. What would you say? How far is it?
A. The bank is just outside of the rail.
Q. About how far?
A. Twenty inches or two feet from the outside of the rail.
Q. How high is the bank?
A. About as high as the platform on the other side.
146 Q. You brought these over?
A. Yes, sir. I brought one and Arbuckle brought the other.
Q. What did you do with them?
A. They were placed on the door of the car.
Q. Did you have some help?
A. I could not say. I don't remember.
Q. Do you remember whether or not you were towards North Vernon or on the other side?
A. No, sir. I don't remember.
Q. As sson as they were brought did you put the cutter on them?
A. There were some in the car and rest of us stayed on the outside.
Q. How did you hold it?
A. We had hold of the crate and pulled easily on it.
Q. Was there anything else done after you got the plank and laid them in the door?
A. That was all there was to do, that is put the cutter on and pull it out.
Q. When you put *these* plank up there, then did someone lift it, that is the cutter up on the plank?
A. I don't remember whether they did or not but I suppose they did.
Q. Anyway you got it on the plank?
A. Yes, sir.
Q. Whad kind of plank were you told to get?
A. Heavy.
Q. You knew what it was for?
A. Yes, sir.
Q. You knew that it was so heavy that they had to us rollers under it?
A. That was the way they handled it in the car.
147 Q. After you — this on the plank you started it down, you on one side and some of the other men on the other side?
A. There were men all around it.
Q. And the railroad skids were still up there?
A. I suppose they were.
Q. You never saw anyone take them away?
A. No, sir.

Q. Were they up there all the time?
A. I rather think not.
Q. Do you know how they finally got down?
A. No, sir, I don't know who took them down.
Q. But they got down someway or other?
A. Yes, sir. But I do know that Arbuckle had hold of them.
Q. What did he do with them?
A. He fixed it around with his hands and pulled it with his foot.
Q. Where did he git it?
A. It was some place near the car.
Q. You remember seeing him have hold of it?
A. Yes, sir.
Q. Then someone pulled it out?
A. Yes, sir.
Q. The machine continued to come down?
A. We eased it down as best we could.
Q. It got about half way down before it broke?
A. Two thirds of the way down or something like that.
Q. Then it broke and fell on you?
A. Yes, sir.
148 Q. Was there anything about these skids that looked weak in anyway?
A. No, sir.
Q. You went over to this log yard to get some heavy timber heavy enough to unload this cutter on?
A. We got the best there was there or we thought we did anyway.
Q. Since your injury you have had Dr. Robertson part of the time?
A. He never made but the one visit.
Q. He is where?
A. Deputy.
Q. And he did not visit you?
A. He only made the one visit.
Q. Did you have Dr. Mathews?
A. Yes, sir.
Q. Is he your family physician?
A. Yes, sir; he is.
Q. He attended you altogether? There was no one else gave you any medical attention?
A. That is all except Dr. Osterman and Dr. Staeman who examined me a couple of times.
Q. When did they examine you?
A. Along toward the last of December and then about two weeks later.
Q. The last of December and the middle of January?
A. I don't remember the exact date.
Q. By that time you had been going around on your crutches some?
A. No, sir.
Q. When did you first start to walking on crutches?
A. Probably after the middle of January sometime.

149 Q. Did Robertson examine you that one visit he made?
A. Yes, sir.
Q. Dr. Staeman and Dr. Osterman did not give you any treatment?
A. No, sir.
Q. Did the osteopath at Columbus?
A. He came down to see me a little over two weeks after I got hurt but he did not give me any treatment then.
Q. You were in pain?
A. Yes, sir.
Q. Have you seen him since?
A. Yes, sir.
Q. When?
A. A few days ago.
Q. How often have you seen him?
A. I have been up there several times to take treatments.
Q. Went to see him?
A. Yes, sir.
Q. The last time was when?
A. Last Saturday.
Q. He is at Columbus now?
A. Yes, sir.
Q. When did the pain begin to let up, that is the severe pain?
A. As soon as the soreness left I did not have such severe pain.
Q. You were pretty much bruised?
A. I don't know whether I was bruised but I was awful sore.
Q. Your ribs hurt you a good deal?
A. Some but I had so much other suffering that I did not notice them.
Q. Your trouble was your bladder and bowels and lower organs?
A. Yes, sir.
150 Q. You started to go about on crutches about when?
A. About the middle of January, just in the house.
Q. Sometime after Dr. Staeman and Dr. Osterman were there?
A. Yes, sir.
Q. And you have been going since?
A. As I got better I could go more.
Q. How soon was it after your injuries that you first began to be able to work your right foot and to have some use of it?
A. It must have been three months.
Q. Sometime last January?
A. Yes, sir.
Q. And you have been trying to use it?
A. Been trying to use it and get it to do all I could.
Q. And Dr. Mathews has been watching that too, has he?
A. He has examined me on several different occastons.
Q. Has he noticed any improvement in that leg?
A. Noticed a little bit.
Q. Your general health and muscles are better?
A. Little bit, yes.

Q. Your muscles get rather flabby after you lay around without working?
A. Sure they do.
Q. But your legs are a little better and your general health is better and your appetite is better?
A. My right foot does not gain scarcely any.
Q. It has gained some in motion, hasn't it?
A. Hardly noticeable.
Q. You heard Dr. Mathews say your improvement was marked?
A. No, sir. He said it was noticeable.
151 Q. That is the same doctor that has been to see you?
A. Yes, he is our family physician.
Q. You heard him testify here this morning?
A. Yes, sir.
Q. Your left leg, how is that?
A. It has gained some.
Q. Better in motion and in sensation?
A. It has gained a little more in motion than it has in sensation.
Q. It has been seven months since you were hurt?
A. I expect it has.
Q. During that time you have regained some motion in your right foot and some motion and sensation in your left leg?
A. Some little, Yes.
Q. Your left has gained more than your right?

Q. And your appetite is more than it was?
A. My appetite is not more than half what it was before I was hurt.
Q. It has got better than what it was when you were first hurt?
A. Yes, of course.
Q. You don't have to have poached eggs all of the time now, do you?
A. I can't afford them.
Q. All this osteopath does is to manipulate the joints and muscles in the body?
A. Yes, sir.
Q. He don't give you any medicine?
Q. No, sir.
Q. Goes after you pretty hard sometimes don't he?
A. Yes, sir.

152 Redirect examination.

By O. H. Montgomery:

Q. You understood that Dr. Staeman examined you for the defendant Company?
A. Yes, sir.
Q. He was not your surgeon?
A. No, sir.
Q. Can you stand alone?

A. I can't stand still. I have to have something to hold to.
Q. You can support your weight, can't you?
A. Yes, but I can't stand still.

153 OLIVER P. GOTHLIN, being duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By O. H. Montgomery:

Q. State your name to the jury.
A. Oliver P. Gothlin.
Q. Where do you live?
A. Indianapolis, Indiana.
Q. What is your profession or business?
A. My title is Chief of the Tariff Bureau of the Public Service Commission of Indiana.
Q. How long have you been connected with the Public Service Commission of Indiana in that capacity?
A. In that capacity since the first of January but I have been employed by the Public Service Commission of Indiana since the first of July 1917.
Q. Had you any connection with any other Public Service Commission before coming to Indiana?
A. Yes, sir. I was a member of the Railroad Commission of Ohio from October the first, 1906 to July first 1911. Member of the Public Service Commission of Ohio from July first, 1911 to the 24th of October 1913. After that I was Superintendent of the tariffs of Ohio until February 1914.
Q. Did you have any office experience prior to your official duties in railroad operation?
A. I began as clerk in the freight office of the Chicago North Western in 1880 and held that place for three years and then for three years I was telegraph operator for the same road. Then I was General agent for the Wisconsin Central at Pittsburgh and then General agent at Chicago and then in 1898 I became traveling Superintendent.

154 Q. State whether or not from your experience as draftsman, as an official in connection with the Railroad Commission of Ohio, and the Public Service Commission of Ohio and the Public Service Commission of Indiana, whether or not you are duly qualified to *interrput* and apply rules of carriers with reference to handling of freight?

The defendant objects to asking an expert whether he is an expert or not. Objection is sustained by the court. Exception for the plaintiff.

Q. You may state now from your experience as a member of the Commission and otherwise, what the carrier would be required to do at the point of destination in regard to a shipment of freight

preliminary to the application of a rule to the effect that "owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that can not be handled by the regular station employees."

By agreement of parties the defendant asks the witness one or two questions preliminary to the defenda-t's objection to the question.

Q. Are the rules and regulations for the handling of freight and the relation between the shipper and carrier, are they in writing?

A. Rules and regulations that govern relation between the carrier and patron are required, as I understand it, to be published in some draft form.

155 Q. In writing?

A. In printing or some duplicate procedure.

The defendant now objects to the question put to the witness by the plaintiff because it is improper to prove by the witness by parole, what he says is in writing or printing, because writing is the best evidence. It is prejudicial to the defendant in this case and there is only one way to prove the contents of a written document and that is by the instrument itself.

Defendant's objection to the questions is sustained by the court. Exception for the plaintiff.

Witness again questioned by the plaintiff:

Q. State to what extent, complete or otherwise the acts of carriers are governed by the written tariff rules filed with the commission?

A. Carriers, I mean so far as possible in human language, are permitted to state definitely and clearly in tariffs, all rules and regulations to govern the relation between the patron and carrier nevertheless time is yet to come when human ability can so state everything so clearly that interr*pu*tation will not be necessary.

The defendant now moves to strike out the answer of the witness because it is not responsive to the question and it calls for what we could for-see that this witness was called here for, an interr*pu*tation of the law which is only for the court trying this case to say.

Defendant's motion to strike the answer of the witness out is overruled by the court, exception for the defendant.

156 Q. Don't you know as a matter of fact that certain railroad carriers in this state and other states have a rule in substance as follows:

"Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings and that cannot be handled by the regular station employees or at stations where the carrier's loading and unloading facilities are not sufficient for handling."

The defendant objects to the question as to what other railroads do or may do or attempt to do. That has no connection with the plaintiff in this case or with the acts of the defendant in this case.

It is immaterial, prejudicial, improper and misleading. The only question in this case is as between this defendant and this plaintiff and not what other railroads or other states may do.

The defendant's objection to the question is overruled by the court; exception for the defendant.

A. The question relates to rule 8-B of the 44th Classification which covers and applies to all railroads in what is known as the Official Classified Territory, which territory is east of the Mississippi and includes the United States as far as the sea board and the Potomac river.

Q. I will ask you whether or not there is any explanation or regulation to that rule or any other written printed rule, specifying, defining, prescribing what the carrier shall do at the point of destination preliminary to invoking this rule.

157 The defendant objects to this because it is giving the contents of a written or printed paper, as the witness has heretofore stated that these rules and regulations inquired about are in writing and this question includes the contents of a written document and it is improper to prove the contents of a written document. That is secondary evidence and it is improper to prove such by parole.

The defendant's objection is overruled by the court; exception for the defendant.

A. Yes, sir.

Q. I will ask you as a member of the Public Service Commission of Indiana and Chief of the Bureau of teriffs, whether or not this rule I have called your attention to, known as rule 8-B is compulsory or is it optional upon the carrier?

The defendant objects to the introduction of such evidence as is now being inquired about. A certain written rule which has been filed with the Interstate Commerce Commission as well as the Public Service Commission of Indiana and that rule speaks for itself and can't be *interrupted* by any witness or by any commission and any *interrputation* of that rule can only be given by the court to the jury. It is not for the witness, expert or otherwise to say whether that is compulsory. It is a written instrument and written in each and every contract of shipment made in the United States.

158 Objection of the defendant is sustained by the court; exception for the plaintiff.

Q. You may state what in your experience and knowledge has been the practice of carriers with reference to the disposition of cars or bulky shipments on their arrival at the point of destination, that purports to come under this rule known as 8-B what was the practice in Indiana in October 1917?

The defendant objects because there is nothing in the pleadings in this case regarding a practice or custom about this matter. It is incompetent to allow any member of a commission either inter-

state or state — prove the practice of railroads in certain things and for the further reason that any practice *divulged* in by any railroad in the United States in opposition to the tariff is a violation of both the Federal and Civil statutes and it is beyond the power of any railroad to set up any practice in violation of the law which the Interstate Commerce Commission has put on the railroads. It can't be proper for any person to come into court by matter of discrimination and say what one court should do. We would have one court saying one thing in Jackson County and another court saying something else in another county. You have to have a uniform rule. These tariffs and schedules are made and approved under law by the Interstate Commerce Commission and the railroads shall not depart therefrom. Any thing the Commission would do would not be of any assistance to the plaintiff in this case.

159 The Question is misleading. It is changing the terms of a written instrument or printed document and is certainly improper. The question is such that it might mean other railroads, the Santa Fe, the Monon, the Big Four. It does not limit it to the defendant in this case. And for the further reason that the witness is not shown to be qualified ti give an answer to this question as an expert.

The objection of the defendant is overruled by the court, exception for the defendant.

A. The practice of all carriers, so far as my knowledge goes, in Indiana and every other state, covered by that date and years before, was to place cars for the consignee to unload and bulky shipments which the consignee is required to unload, at an accessible point and to notify the consignee so that he can unload as required by law.

Q. What application, if any, did this rule, known as 8-B have on any person not named in the bill of lading as consignee?

The defendant objects to the question. Objection is sustained by the court.

Now the plaintiff rests.

160 Now at this time comes the defendant and the plaintiff having acknowledged in open court that *its* case was closed and that that was all the evidence *they have* and moves the court at this time to instruct the jury to render a verdict in favor of the defendant for the reason that the plaintiff has totally failed to introduce to the jury any evidence whatever tending to sustain the material issues in this case as presented by the pleadings in this cause.

Motion of the defendant to give the jury preemptory instructions to render a verdict in favor of the defendant is overruled by the court. Exception for the defendant.

161 The defendant now introduces its evidence in the case.

(Certificate attached to the Defendant's exhibit marke- "1" certifying that the exhibit marked "1" is the true copy of Official Classification #44) is introduced and read to the jury in evidence.

Publice Service Commission,

Indiana.

I, Carl H. Mote, Secretary of the Publice Service Commission of Indiana, do hereby certify that the schedule hereto attached is a true copy of Official Classification No. 44, R. N. Collyer, Agent, L. R. C.—O. C. No. 44, said schedule having been filed with the Publice Service Commission of Indiana on December 14, 1916.

The rubber stamp addition appearing on the schedule hereto attached is expressly excluded from this certificate, as said addition does not appear on copy of said L. R. C.—O. C. No. 44 on file.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 23rd day of May, A. D. 1918.

(Signed) CARL H. MOTE,

[SEAL.] *Secretary Publice Service Commission of Indiana.*

162 (Certificate of the Secretary of the Interstate Commerce Commission that the exhibit marked "1" is *the is* a true copy of the Official Classification #44 is introduced and read in evidence to the jury.)

Interstate Commerce Commission,

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached is a true copy of the Official Classification No. 44, R. N. Collyer, Agent, L. C. C.—O. C. No. 44 said schedule having been filed with the said Interstate Commerce Commission on December 12, 1916.

The rubber stamp addition appearing on the schedule hereto attached is expressly excluded from this certificate, as said addition does not appear on copy of said L. C. C.—O. C. No. 44 on file.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 9th day of May A. D. 1918.

(Signed) GEORGE B. McGINTY,

[SEAL.] *Secretary of the Interstate Commerce Commission.*

163 Now comes the defendant and offers to introduce in evidence Exhibit marked "1" the Official Classification #44.

The plaintiff objects to the introudction of the entire book as it does not all pertain to this case.

Objection of the plaintiff is sustained by the Court, exception for the defendant.

The defendant now offers to introduce in evidence Rule 8-B on page 30 of the Official Classification #44 which was shown to be in force and effect on the date of the injury.

Rule 8-B on page 30 of the Official Classification #44 is introduced and read to the jury in evidence.

Rule 8-B.

Section 1. Owners are required to load and unload all freight carried at carload ratings.

Section 2. Owners are required to load and unload heavy or bulky freight carried at L. C. L. Ratings that cannot be handled by the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling.

The defendant rests and this is all the evidence given in the said cause.

164 STATE OF INDIANA,
Jackson County, ss:

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

I, Flossie Collins, official shorthand reporter of the Jackson Circuit Court of the state of Indiana, do hereby certify that I am the official shorthand reporter of said court, duly appointed and sworn to report in shorthand the evidence of causes tried therein; that as such shorthand reporter I took down in shorthand, in the above entitled cause, a full, true and complete verbatim report of all the evidence given and offered by the parties in said cause, and of all the objections thereto and the rulings of the court thereon, and of all the exceptions thereto; and I do further certify that the foregoing (typewritten) manuscript is a full, true and complete copy in longhand, made by me, of the shorthand report of said evidence, objections thereto, rulings of the court thereon, and of the exceptions taken and received thereto, and that said longhand transcript of said shorthand report of said evidence contains all the evidence given in said cause.

Witness my hand this 19th day of November, 1918.

(Signed) FLOSSIE COLLINS,
Court Reporter.

Filed Jan. 15, 1918.
WILLARD STOUT,
Clerk Jackson Cir. Court.

Subscribed and sworn to before me this 19th day of November, 1918.

(Signed) BESS NEWKIRK,
[SEAL.] *Notary Public.*

Commission expires April 12, 1922.

165 Be it further remembered that afterwards on the 15th day of January 1919, and within the time fixed and allowed by

the Court therefor, the defendant, The Baltimore and Ohio Southwestern Railroad Company, presented and tendered to the said James A. Cox, Judge of said Court, this its Bill of Exceptions, for his signature and prayed that the same might be signed, sealed and made a part of the record of said cause, and which said Bill of Exceptions is now, here on this 15th day of January, 1919, allowed, signed and ordered by the said James A. Cox as said Judge to be and constitute a part of the record and proceedings of said cause. The Clerk of said Court is hereby ordered to file the same as a part of the record and proceedings in said above entitled cause of action.

In witness whereof I have hereunto set my hand this 15th day of anuary 1919.

(Signed) JAMES A. COX,
Judge of the Jackson Circuit Court.

Filed Jan. 15, 1919.
WILLARD STOUT,
Clerk Jackson Cir. Court.

Certificate of Judge.

I, James A. Cox, Judge of the Jackson Circuit Court, hereby certify that I have examined, approved and signed and filed the foregoing bill of exceptions and further certify that said bill of exceptions contains all the evidence given in said cause together with the Court's rulings and all objections and exceptions relating thereto.

Witness my hand and seal this 15th day of January 1919.

(Signed) JAMES A. COX,
Judge of the Jackson Circuit Court.

166 And afterwards, to-wit, on the 15th day of January 1919, the following further proceedings were had in said cause, to-wit:

Be it remembered that on the 15th day of January, 1919, the defendant in said cause files its written praceipe herein, which prœcipe is in words and figures as follows to-wit:

167 STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court.

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Præcipe.

To the Clerk of the Jackson Circuit Court:

The defendant in the above entitled cause, The Baltimore and Ohio Southwestern Railroad Company, hereby requests you to prepare and properly certify for use on appeal to the Supreme Court of the State of Indiana, a transcript of all the papers, entries præcipe, instructions given, requested and refused, files, orders and proceedings filed and had in the above entitled cause and of all orders, rulings and exceptions made and taken in said cause and of the judgment therein rendered, excepting only from said transcript defendant's general bill of exceptions and defendant requests you to embrace in the transcript, defendant's original bill of exceptions, containing all of the evidence given in said cause, together with the court's rulings and all objections and exceptions relating thereto, instead of a copy of said general bill of exceptions.

KOCHENOUR & PRINCE AND
McMULLEN & McMULLEN,
Attorneys for Defendant.

168 STATE OF INDIANA,
Jackson County, ss:

I, Willard Stout, Clerk of the Jackson Circuit Court, State of Indiana, do hereby certify that the above and foregoing transcript contains true and complete copies of all the papers, records, entries, instructions, which instructions were signed and filed by the Court at the close of the instruction to the jury præcipe and bill of exceptions in said cause except the defendant's original general bill of exceptions.

And I further testify, that the original bill of exceptions is hereby embraced in the transcript instead of a copy; that the original bill of exceptions embraced in the transcript is the original bill of exceptions filed in said cause by the Judge of said Court, which bill was duly signed by James A. Cox, sole judge of said Court, and by him filed in the office of the Clerk of said Court, on the 15th day of January 1919 all within the time permitted by law and allowed by said Court, all as required by the defendant's præcipe hereto attached and herein copied.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at Brownstown, Indiana this 15th day of January 1919.

(Signed) WILLARD STOUT,
[SEAL.] *Clerk of the Jackson Circuit Court.*

169 STATE OF INDIANA:

In the Supreme Court of Indiana.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

vs.

GUERNEY O. BURTCH, Appellee.

Assignment of Errors.

The Appellant in the above entitled cause says there is manifest error in the judgment and proceedings, prejudicial to Appellant in said cause in this, towit:

1. The Court below erred in overruling Appellant's demurrer to the first paragraph of Appellee's complaint.

2. The Court below erred in overuling Appellant's demurred to the second paragrapg of Appellee's complaint.

3. The Court below erred in overruling Appellant's motion for a new trial.

4. The Court below erred in overruling Appellant's motion to make Appelle-'s complaint and each paragraph thereof more specific.

5. The Court below erred in overruling Appellant's motion to separate the different causes of action set forth in Appellee's complaint into separate paragraphs and to separately number the same.

(Signed) McMULLEN & McMULLEN,
Attorneys for Appellant.

170 And afterwards, towit: On the 17th day of February, 1919, being the 73rd juridical day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the parties by their counsel, and this cause is submitted to the court for judgment and decree as provided by an act of the General Assembly of the State of Indiana, approved April 13th, 1885, and the rules of said Supreme Court adopted in relation thereto.

And afterwards, towit: On the 26th day of March, 1919, the same being the 105th juridical day of the November Term, 1918,

of said Supreme Court the following further pleas and proceedings were had in said cause, towit:

Comes now the appellant by counsel and files a petition for an extension of time in which to file brief, and on the same day the court being fully advised, said petition was granted and brief to be filed on or before May 16, 1919.

And afterwards, towit: On the 16th day of May, 1919, the same being the 149th juridical day of the November Term, 1918, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellant by counsel and files its brief (8) in the words and figures following:

171 And afterwards, towit: On the 29th day of May, 1919, the same being the 4th juridical day of the May Term 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files objections to record and brief in the words and figures following:

And afterwards, towit: On the 4th day of June, 1919, the same being the 9th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files a petition for an extension of time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before August 15, 1919.

And afterwards, towit: On the 17th day of July, 1919, the same being the 46th juridical day of the May Term 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files a petition for an additional extension of time in which to file brief, and on the same day the court being fully advised, said petition was granted and brief to be filed on or before October 1, 1919.

172 And afterwards, towit: On the 28th day of August, 1919, the same being the 82nd juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellant by counsel and files application for order on appellee's attorney to return record to Clerk's office and for permission to amend brief in the words and figures following:

And afterwards, towit: On the 6th day of September, 1919, the same being the 90th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Come now the parties by counsel, and the court being fully advised in the premises, orders that the Clerk notify attorneys for appellee that motion to amend brief herein will be heard on September 18, 1919, or as soon thereafter as it can be heard, and on the same day notices were issued.

173 And afterwards, towit: On the 17th day of September, 1919, the same being the 99th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files objections to appellant's application for leave to amend brief herein in the words and figures following:

And afterwards, towit: On the 26th day of September, 1919, the same being the 107th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files his brief (8) in the words and figures following:

And afterwards, towit: On the 7th day of October, 1919, the same being the 116th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

The court being fully advised in the premises, grants appellant's application for permission to amend brief herein.

174 And afterwards, towit: On the 14th day of October, 1919, the same being the 122nd juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellant by counsel and files a petition for an extension of time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before November 2, 1919.

And afterwards, towit: On the 3rd day of November, 1919, the same being the 139th juridical day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellant and files its brief (8) in the words and figures following:

And on the same day, the following further pleas and proceedings were had in said court in said cause:

Comes now the appellant by counsel and files its reply brief (8) in the words and figures following:

175 And afterwards, towit: On the 30th of September, 1920, the same being the 112th juridical day of the May Term,

1920, of said Supreme Court, the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files additional authorities (8) in the words and figures following:

And afterwards: On the 14th day of March, 1922, the same being the 92nd juridical day of the November Term, 1921, *fo* said Supreme Court, the following further pleas and proceedings were had herein:

176 Copy.

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1921.

On the 14 day of March, 1922, being the 92nd Judicial day of said November Term, 1921.

Hon. Louis B. Ewbank,
Chief Justice.

Hon. David A. Myers,
Hon. Julius C. Travis,
Hon. Benjamin M. Willoughby,
Hon. Howard L. Townsend,
Associate Judges.

No. 23536.

In the Case of

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY

vs.

GUERNEY O. BURTCH.

Appealed from the Jackson Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by—

MYERS, *J.*:

177 This was an action by appellee against appellant to recover damages for personal injuries for which appellant was alleged to be responsible. The complaint was in two paragraphs. A general denial to each of those paragraphs formed the issue submitted to a jury for trial which resulted in a verdict and judgment in favor of appellee for $8,000. Appellant has assigned, and relies on alleged

errors of the court, (1) in overruling its motion to make each paragraph of the complaint more specific; (2) in overruling its demurrer to each paragraph of the complaint for want of facts, and (3) in overruling its motion for a new trial.

The first paragraph of the complaint is based upon the Employers' Liability Act. Acts 1911, p. 145; §8020*a* et seq., Burns 1914. From this paragraph it appears that on October 24, 1917, appellant, an Indiana corporation employing more than five persons, was engaged in operating a steam railroad through the county of Jennings and other counties of this state. On the date stated it operated a freight train on its line of road with one Ed Jackson as conductor in charge thereof, which train, in one of its cars, carried a machine weighing about 2,000 pounds, and known as an ensilage cutter. This machine was to be unloaded by Jackson, as such conductor, at the town of Commiskey, Jennings County, the place of its consignment, and where appellant maintained a depot and platform, a main track, a side track, and a loading track. Jackson and his only assistants, three persons employed as brakemen on the train, by reason of the great weight of the machine, were unable to unload it safely. Thereupon, Jackson requested appellee to assist him. In obedience to this request, and not otherwise, appellee thereupon entered into the work and while he was thus engaged, and in the exercise of due care, one of the planks then in use in unloading the machine broke and the machine fell upon him, seriously and permanently injuring him. The negligence charged was: failing and omitting to provide and furnish men sufficient to unload the machine; failing to furnish safe and suitable appliances with which to perform the work; failing to unload the machine from the car to the platform; failing to place the car on the loading track and then unloading the machine on the ground to the east thereof; attempting to unload the machine from the car on the switch to the ground east of the loading track by the use of two green planks 10 or 12 feet in length; and failing to inspect, test or support the planks so used.

178 The second paragraph proceeds upon the theory of an action at common law, and in substance alleges that appellee was a one-seventh owner of the machine and as such owner was present to receive the same, and who, upon the request of Jackson as conductor, undertook to assist in unloading it. The negligence charged is the same as that charged in the first paragraph.

We will first give attention to the motion to make each paragraph of the complaint more specific. It is apparent from the nature and character of the facts called for by the motion, that appellant was fully cognizant of all of them, or at least its position for knowing them was superior to that of appellee. Hence, if the complaint was other wise sufficient to fully and definitely advise appellant of the case it was required to meet, and we so hold, then the court's ruling in this regard was not erroneous. Haskell & Barker Car Co. v. Trzop, (—), 128 N. E. 401; Haskell & Barker Car Co. v. Logermann, (—) 123 N. E. 818; Thos. Madden Son & Co. v. Wilcox, (—) 174 Ind. 657; Knickerbocker Ice Co. v. Gray, (—) 171 Ind. 395; Pitts-

burgh etc. R. Co. v. Simmons, (—) 168 Ind. 333; St. Louis etc., R. Co. v. Brantley, (—) 168 Ala. 579.

In considering the demurrer to the complaint it may be said that each paragraph thereof is grounded upon negligence. Hence, each paragraph, in order to withstand the objections lodged against it, must exhibit facts showing the existence of a duty on the part of defendant to protect plaintiff from the injury of which he complains; a failure of defendant to perform that duty, and that such failure was the proximate cause of the injury. In respect to these essential elements to constitute negligence, appellant insists that neither of these paragraphs disclose a relation between it and appellee whereby it is charged with any duty to appellee other than not to willfully injure him.

The first paragraph of the complaint proceeded upon the theory that Jackson, as conductor in charge of appellant's train and of its work of unloading the ensilage cutter, was authorized to employ assistants in that, a necessity existed for assistance to do the work safely; that appellant, in the activities of unloading the machine, was represented by Jackson, at whose request appellee engaged in the work, thus entitling him to the same protection afforded other servants of appellant.

179 While the facts relied on by appellee in this paragraph as a basis for recovery, present, in form, a new question to this court, yet the decision thereof does not require that we invoke a new principle. Generally speaking, it is true, the master is not bound nor is he under any duty to those who perform services for him at the request of a servant engaged to do a given work, other than not to willfully injure him. Obviously this rule ordinarily must obtain, for if it were otherwise, the master might be involved in risk and responsibility imposed by the act of another without his authority or consent. However this may be, the outstanding facts of this paragraph take this case without that rule and within the rule permitting a servant to bind his master in case of some unfor-seen contingency or existing emergency. It may be conceded that Jackson had no general authority to employ or discharge assistants, but from all the facts and circumstances here shown, Jackson, in the performance of his duty of unloading the machine, represented appellant. It also appears that appellant failed to furnish him sufficient manpower and appliances reasonably necessary for him to accomplish the work safely. It may be argued with much force that an emergency employee is not in the employ of the master in a sense to create the relation of master and servant, but when it appears that by reason of some unfor-seen contingency or existing emergency reasonably requiring temporary assistance to do work safely, the servant in charge thereof as the representative of the master in that particular, may employ temporary assistants, as in this case, and his action in that regard will bind the master on the principle of implied authority so to do, and the person thus employed thereby, for the time, is entitled to the same protection as is the servant or agent upon whose request he rendered the assistance, even though he may not be entitled to recover wages. Aga v. Harbach, (—) 127 Iowa

144; St. Louis & S. F. R. Co. v. Bagwell, (—) 33 Okla. 189; 40 L. R. A. (N. S.) 1180*a*; Georgia Pacific Ry. Co. v. Propst, (—) 83 Ala. 518, 525; W. H. Neill Co. v. Rumph, (—) 148 Ky., 810; Sloan v. Central Iowa Ry. Co., (—) 62 Iowa 728, 736; Railroad v. Ginley, (—) 100 Tenn. 472; Street Railway Co. v. Boston, (—) 43 Ohio. 224.

The implied authority of a railroad conductor to employ a third person in case of a temporary existing emergency—A physician for an injured brakeman—has been considered and affirmed by
180 this court. Terre Haute etc. R. R. Co. v. McMurray (—) 98 Ind. 358; Terre Haute, etc. R. R. Co. v. Brown, (—) 107 Ind. 336; Louisville etc. Ry Co. v. Smith, (—) 121 Ind. 353. While the emergency in these cases was exceedingly potent, yet they recognize the principle supporting the cases above cited from other jurisdictions.

At the time appellee received his alleged injuries Jackson was in charge of the train and its crew. He was seeking to accomplish an end—the unloading of the machine—which was within the scope of his alleged employment. So it is said, "where a servant is engaged in accomplishing an end which is within the scope of his employment and while so engaged adopts means reasonably intended and directed to the end, which result in injuries to another, the master is answerable for the consequences, regardless of the motive which induced the adoption of the means; and this, too, even though the means employed were outside of his authority, and against the express orders of the master." Pittsburgh etc. Ry. Co. v. Kirk, (—) 102 Ind. 399, 402.

When appellee accepted Jackson's request and entered upon the work he had the right to expect that Jackson, as the representative of appellant, would use ordinary care for his safety, and certainly so, in so far as he might be affected by the use of appliances furnished. The fact that there may have been other and more safe ways and means of handling the machine will not shield appellant from the negligence here charged, for it was appellant, through Jackson, and not appellee, who chose the place, adopted the appliances, and the manner of doing the work.

The second paragraph, among other facts states that appellant was to unload the machine from its car at the town of Commiskey and that appellee as part owner thereof was there to receive it. He assisted in unloading the machine at the request of Jackson, who, as appellant's representative, was in charge of that work. He was injured while thus engaged, through the alleged negligence of Jackson. Such being the status of the parties it is clear that appellee at the time he received the injury of which he complains, was neither a mere volunteer, a tresspasser, nor a mere licensee. Hill v. Chicago etc. R. Co., (—) 188 Ind. 130; Empire etc. Co. v. Brady, (—) 164 Ill. 59; 60 Ill. App. 379. Hence the doctrine of respondeat superior applies. In the case of Welch v. Maine Central R. R. Co., 86 Maine, 552, 565 it is said,

181 "Where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and,

at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible." Meyer v. Kenyon-Rosing Mach. Co. (—) 95 Minn. 329; Kelly v. Tyra, (—) 103 Minn. 176; Empire etc. Co. v. Brady, supra; Railroad v. Ward, (—) 98 Tenn. 123; Railroad v. Ginley, (—) 100 Tenn. 472; Weatherford etc. Ry Co. v. Duncan, (—) 88 Texas 611; Eason v. S. & E. T. Ry. Co. (—) 65 Texas 577; Street Railway Co. v. Bolton, supra; Jackson v. Southern Railway, (—) 73 S. C. 557.

Appellant, in the exercise of ordinary care, under all of the circumstances here shown, was in duty bound only, as an ordinarily prudent person, to furnish such appliances and take such precautions reasonably necessary to avoid exposing appellee to unnecessary peril. The pleaded facts show that appellant failed to perform its duty in the particulars mentioned, and the demurrer was properly overruled.

Appellant, in support of its motion for a new trial, insists that the trial court erred in permitting appellee's witnesses, Hartwell, Green, Lurton, and Gothlin to answer certain questions put to them on direct examination. Looking at appellant's brief it apepars that at the time, and for about eight years prior to the time appellee was injured, Hartwell was the telegraph operator at the town of Commiskey and his post of duty was at appellant's depot. This witness testified to the arrival of appellant's freight train, carrying the ensilage cutter weighing about 1,700 pounds, with Jackson, as conductor in charge of the train. The train was placed upon the side track where appellant's employees began to unload freight, a part of which was the ensilage cutter. Six or eight persons, one of whom was appellee who had a short time before made inquiry about the arrival of the machine, were standing upon the platform. To these persons Jackson made a general request for assistance in unloading the cutter, and that someone get heavy timbers for that purpose. Witness assisted in getting the cutter to the door of the car but left before the timbers came and did not see them until after the accident. In answer to one of appellee's question- witness testified that he had frequently heard the conductors ask bystanders for assistance when needed to unload heavy freight, but did not know how long this practice had prevailed.

182 Green was appellant's station agent at the town of Commiskey at the time of the accident, and had been for about two years prior to that day, and in answer to a question by appellee, said that "it has frequently been the practice that conductors would ask bystanders to help unload heavy freight."

The ensilage cutter was consigned to Lurton, a merchant who resided in the town of Commiskey. For fifteen years prior to 1913, Lurton was the agent of appellant at Commiskey, and in answer to a question, testified that "It is a very common occurrence for a train crew to ask someone to help with heavy freight."

Appellant objected to each of the questions calling for the practice of conductors requesting bystanders to help unload heavy freight, as they were propounded to the witnesses, for the reason that they

did not tend to prove a fact within the issues and that any such practice would be contrary to law. Motions were made to strike out each of the answers for practically the same reasons urged in support of the objections to the questions.

True, appellee's complaint is silent as to the custom and practice of conductors calling on bystanders to assist in unloading heavy freight. It is also true, as we have said, that the first paragraph of his complaint proceeded upon the theory of an emergency existing for additional help to unload the machine, and recovery was sought upon the ground of the conductor's authority to employ assistants in such cases. Thus it will be seen that authority, either express or implied, in Jackson, to make the alleged request acted upon by appellee was an essential element of his cause of action. The object of the questions, so challenged, was to furnish evidence tending to show appellant's knowledge of the practice of its conductors calling on bystanders to assist in unloading heavy freight at the town of Commiskey. For consent or authority may result from the master's knowledge of a practice long continued by his servants in charge of his work. Authority, as we have said, to bind the master, as here considered, may be either express or implied, and evidence tending to provie either was admissable under the issues of this case. The admitted testimony now in question was properly allowed to go to the jury as tending to show that Jackson had implied authority to make the request to which appellee responded. In Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 450, it is said:

183 "Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on the part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied."

Witness Gothlin, after stating that since July, 1917, he had been chief of the Tariff Bureau of the Public Service Commission of Indiana; member of the Ohio Railroad Commission from October 1, 1906 to July 1, 1911; member of the Public Service Commission of Ohio from July 1, 1911 to October 24, 1913; and then, Superintendent of Tariffs of Ohio until February, 1914, and prior to October, 1906, he had held various positions with various railroads, was asked to what extent, complete or otherwise, the acts of carriers are governed by the written tariff rules filed with the commission, in effect answered that carriers were "permitted to state definitely and clearly in tariffs, all rules and regulations to govern the relation between the patron and carrier;" but so far, they had been unable to state, in rules, everything so clearly as to avoid interpretation. Appellant's motion to strike out this answer, for the reason that it was not responsive to the question and called for an interpretation of the law which was for the court, was overruled. While this answer was

quite general and in a measure lacked responsiveness, yet it was not harmful to appellant and the court's ruling on the motion cannot be regarded as reversible error.

Later this same witness was asked as to his experience and knowledge of the practice of carriers in Indiana in October, 1917, as to disposition of cars or bulky shipments on their arrival at the point of destination under rule 8-B. The objections to this question, in substance, were, that it called for evidence tending to prove custom and practice among carriers which was not pertinent to any issue; that it was general and not directed to any acts of defendant, and that any practice changing the terms of the rule would be in violation of law. The attention of the witness had been called to rule 8-B in a former question. That rule provided:

184 "Section 1. Owners are required to load and unload all freight carried at carload ratings. Section 2. Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that cannot be handled by the regular employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling."

The obvious purpose of the question under consideration was to show custom, practice or usage by railroads generally in this state as to their disposition of cars or bulky shipments of freight at point of destination. It pertained to the methods in use by such carriers, at such point prior to a release of such freight to the consignee. These were facts aside from rule 8-B, and, for aught appearing, facts not covered by any rule. It referred to the practice of such carriers in the ordinary course of their business when relying upon the terms of the rule as to the duty of unloading such shipments. True, the question referred to rule 8-B, but in that respect it merely identified the character of freight covered by the inquiry. A custom or practice may be of such universal prevalence as to become a part of the existing law and of which courts will take judicial notice, but where a custom or practice is circumscribed and limited in its application it must be supported by proof, and when well established, it is as obligatory on the objects of its operation as would be a general law. With this view of the question, it did not invite the witness to interpret or give the rule any particular construction, nor call for evidence tending to prove a custom or practice in contravention of it.

In this case the complaint shows, and it is supported by uncontradicted evidence, that appellant, at the town of Commiskey, maintained a platform and at least three tracks, each of which had a designated purpose. Charges of negligence are based upon appellant's omission to use certain of these tracks for unloading the machine. From the undisputed evidence it appears that the platform was ten or twelve inches high composed of brick and extended from the station a short distance along the main track; that the ensilage cutter was consigned to a merchant having a store room and regularly engaged in business at that town, and who had sold the cutter to a group of persons, one of whom was appellee; that the train, of which

the car carrying the cutter was a part was placed upon the side track and the conductor who had charge of the train, without any notice to the consignee of the cutter, or placing the car containing the cutter in a position for the consignee to unload, and while the car was a part of the train, undertook to unload it by calling on by-
185 standers, among whom was appellee, to aid the three brakemen in this work.

Now, if it be admitted that it was the duty of the owner of the machine, in this case the consignee, to unload it, it was proper for appellee to show any custom or practice at desination points universally followed by carriers in handling freight covered by the rule.

The witness in this case was shown to be qualified to answer the question. The question, under the circumstances of this case, was a proper one and a responsive answer was properly allowed to go to the jury.

Appellant further insists that the court erred in refusing to give five of its requested instructions and in giving six of the instructions requested by appellee. Appellee makes the point (1) That the record does not show that appellant tendered its requested instructions prior to the beginning of the argument to the jury; (2) That the record affirmatively shows that the trial court did not indicate by written memorandum at the close of the instructions requested by each of the parties, the numbers of those given and of those refused, and sign the same before argument.

The record on this subject shows, that on May 27, 1918, the trial of this cause began, and on the following day the evidence was concluded, the jury instructed, and a verdict returned. On this last date, appellant in writing requested that the court give its instructions to the jury in writing, and that it indicates before argument the instructions to be given, to the end that the same may be used by counsel in argument to the jury, but with this request no instructions were tendered. An orderbook entry states that at the close of the instructions to the jury, all instructions requested and all instructions given by the court of its own motion, together with the exceptions of appellant in relation thereto endorsed thereon, were, by the judge of the court, filed with the clerk, which instructions, endorsements and notations are shown in the same entry in the order following: Two instructions given by the court on its own motion; all the instructions requested by appellee and obviously tendered before argument to the jury; all those requested by appellant; followed by six instructions given by the court on its own motion. The instructions given by the court on its own motion were numbered consecutively and signed by the judge. On the right hand margin and
186 opposite each instruction of each series requested is the word "given" or "refused". At the close of each of the requested series of instructions numbered consecutively, there is a memorandum dated May 28, 1918, signed by appellant's attorneys and also by the trial judge, stating that appellant at the time excepted to the giving of certain instructions severally, tendered by appellee, specifying the same by numbers, and that it excepted to the court's refusal

to give each of certain of its requested instructions, designating them by numbers, and also as a part of each memorandum the numbers of the instructions requested and given are indicated by number. At the conclusion of all the instructions is the signature of the trial judge.

The facts thus disclosed by the transcript, although indicating lack of care in the preparation of the original entries, must be regarded as sufficient to show a substantial compliance with an act concerning civil procedure approved March 12, 1907. Acts 1907, p. 652, §1; §561 Burns 1914. This act affords a method for making instructions a part of the record and of saving exceptions thereto. According to the provisions of this section of our code, when either party desires the court to instruct the jury in writing, a request therefor must be made before the commencement of the argument to the jury. In this case, appellant made the request and a fair interpretation of the transcript indicates that such request was timely made.

As to the requested instructions, it sufficiently appears that the court indicated *"before instructing the jury,* (Our italics) by a memorandum in writing at the close" of these instructions "the numbers of those given and of those refused," which memorandum was signed by the judge. It affirmatively appears that the court, as requested, gave all of the instructions tendered by appellee and seven of the fourteen instructions tendered by appellant. From this action it would seem that all instructions were tendered in time, thereby distinguishing the case at bar from the cases cited by appellees, namely; Fox v. Barekman, (—) 178 Ind. 572; Stamets v. Michenor, (—) 165 Ind. 672; and Supreme Tent etc. v. Ethbridge, (—) 43 Ind. App. 475. The record under consideration does not sustain appellee's contentions.

Appellee also insists, that appellant's original brief does not set out that part of its motion for a new trial claiming error of the court in
giving any of appellee's instructions or in refusing any of
187 appellant's requested instructions. Since the filing of appellee's brief appellant obtained leave from this court to file a corrected brief in the particulars mentioned, and so filed the same. Appellee has not answered the amended brief, consequently we have no suggestions from him on the merits of the questioned instructions.

Instructions Nos. 3 and 5 requested by appellant and refused in effect, told the jury that an emergency arises from conditions compelling one "to act in a certain manner from which there is no escape or choice to the contrary," or that if Jackson had any other ways or means, or by moving his train to another place where the cutter could have been unloaded, there was no emergency for unloading in the manner attempted. Under the allegations of the complaint, Jackson represented appellant in selecting the place and in undertaking to remove the cutter from the car. It was the circumstances and conditions thus created and there controlled by appellant, together with its assumption of the work its employees then and there present were unable to perform without calling assistance, that formed the basis for the charge of an existing emergency. Hence, a

general instruction (No. 3), or one (No. 5) limited to the first paragraph of the complaint, requiring appellee to exclude, by a fair preponderance of the evidence, every possible manner by which appellant's employees at hand might have possibly unloaded the machine safely, was too narrow and therefore rightfully refused.

Instruction No. 7, if given, would have presented the case to the jury as one governed by §4 of the Federal Employers' Liability Act. If it be conceded that appellant, while carrying the cutter, was engaged in the business of interstate commerce, it does not follow necessarily that one who is called specially to assist in unloading it at the point of its destination, is, while thus at work, engaged in interstate commerce. In Pierson v. N. Y. S. & W. R. R. C., (—) 83 N. J. L. 661, 664, the court in speaking of §1 of the Federal Employers' Liability Act, said: "By it liability is imposed upon a common carrier by railroad, in case it is engaged in the business of interstate commerce, but only while engaging in such business at the time of the happening of an accident which produces injury to an employe. And it does not impose such liability even when the carrier is so engaged, unless the person injured is at the time of the occurrence of the accident himself employed by the carrier in such commerce. In other words, the purpose of the statute is 'to
188 secure the safety of interstate transportation and of those who are employed therein.' Mondou v. New York, New Haven and Hartford Railroad Co., 223 U. S. 1, 51." See also; Shanks v. Delaware etc. R. Co., (—) 239 U. S. 556; Pederson v. Delaware etc. R. Co., (—) 229 U. S. 146; Illinois Central R. R. Co., v. Behrens, (—) 233, U. S. 473; Gray v. Chicago etc. Ry. Co., (—) 153 Wis. 637; Barker v. Kansas City etc. Ry. Co., (—) 88 Kan. 767; 43 L. R. A. (N. S.) 1121. Moreover, the word "employed," as used in the Federal Act and found in the phrase "while employed by such carrier," has been construed to mean persons working for the carrier "at its request and under an agreement on its part to compensate them for their services," Missouri etc. Ry. Co. v. West, (—) 38 Okla. 581. Furthermore, courts have announced test questions for determining when a personal injury to an employee of a railroad company is within the Federal Act. The test given in Lamphere v. Oregon etc. Co., (—) 196 Fed. 336; 47 L. R. A. (N. S.) 1, is "What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce?" This test was followed in Shanks v. Delaware etc. R. Co., (—) 163 App. Div. (N. Y.) 565, affirmed, 214 N. Y. 413, and on appeal to the Federal Supreme Court, supra, p. 558, it is said: "The true test of Employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." In the case at hand the cutter had arrived at its destination, and, under rule 8-B it was the duty of the consignee to unload it. The duty as fixed by this rule was equally obligatory on both appellant and the consignee of the shipment. As between them, as claimed by appellant, it was a law for their guidance. In connection with this rule we are confronted with evidence undisputed that it was the universal custom

of railroads to place the car containing a shipment, as in this case, at some convenient point for the consignee to unload and to notify him. Thus it may be said that an interstate shipment within rule 8-B is in interstate transit from loading to unloading points, and ceases to be such only when placed under consignee's control for unloading. When this is done, a railroad carrier has completed its last stage of service, and, as to such shipment, it is no longer engaged in interstate transportation. Hence, any act by such carrier
189 thereafter with reference to the unloading of such shipment, or by any of its employees or others called by it to assist in such act, would not be a furtherance of or an engaging in interstate transportation within the meaning of the Federal Act. Appellant, by its representative—the conductor—decided to and did actually enter upon the work of unloading the cutter while the car containing it was a part of the train standing on the side track, and work which, under the evidence, all must agree was that of another, had appellant performed its final act of transportation by placing the car in the hands of the consignee. This it did not do. Consequently appellant, in defending the instant action found itself compelled to admit either that it was its duty to unload the cutter and that rule 8-B did not apply, or that rule 8-B did apply and that by engaging in the work it not only violated the rule claimed by it to have the force of a general law, but a proven universal custom as well. It chose the latter position thereby interposing its own wrong in opposition to a chosen remedy which, but for such wrong, would be a proper one as the basis of an action instituted not by the consignee, but by one who was induced to answer appellant's call for assistance in performing a work in violation of a rule it is now offering as a shield against responsibility for its negligence claimed to be the proximate cause of appellee's injury. Appellant's position in this respect ought not and cannot be approved. There was no error in refusing the instruction.

The court was also right in refusing Instructions Nos. 8 and 11, as they were pertinent only in a case within the Federal Act.

Appellee requested seven instructions, all of which were given. Of these instructions, appellant claims that six were erroneous. It objects to the first two for the reason that neither refers to the facilities of defendant for unloading the machine; that the jury was allowed to determine, unaided, the question of an emergency; that each was misleading and ignored the idea of an assumption of risk. Instruction No. 1 referred to the finding of certain facts which might have been influential with the jury in determining an existing emergency, without any admonishment with reference to its consideration of the instrumentalities furnished by appellant to its employees for unloading the machine. While the instruction may be subject to criticism for its failure in that respect, yet upon an examina-
190 tion of the pleadings and evidence, we are convinced that the omission mentioned did not mislead the jury nor was it harmful to appellant.

The assumption of risk objection applies more properly to No. 2, and is the sole objection to No. 3, and failure to tell the jury that it

might consider contributory negligence of appellee in litigation of his damages is urged against No. 6. As the first paragraph of complaint rests upon our local Employers' Liability statute, supra, a charge, under the circumstances here shown, that appellee assumed the risk or that the jury might consider acts of contributory negligence of appellee in diminution of his damages, would have been error. Hence, appellant's objections to these instructions were not well taken.

Instruction No. 4 was on the subject of the master's duty to furnish his employees with reasonably safe and suitable tools and appliances and to make proper inspection of the same. The sole objection urged against this instruction is, that it requires the master to "inspect all tools, whether intricate or simple." We are satisfied the jury understood from this charge that the master was only required to use the care of an ordinarily prudent and careful person under all the circumstances to keep his tools and appliances in a safe condition for the use of his employees in performing their duties. It was not error to give this instruction.

Instruction No. 5 is limited to the second paragraph of the complaint and is in accord with our ruling as to the sufficiency of that paragraph. It told the jury, in substance, that if plaintiff had an interest in the cutter and by reason thereof was on defendant's right of way with its knowledge and consent, then he would not be a trespasser and defendant would be bound to exercise ordinary care for his safety, and would be liable for any injury sustained by plaintiff proximately caused by its negligence and to which plaintiff's negligence did not contribute. This instruction in no way involved the subject of master and servant or the rule applicable to fellow servants. It rests upon a mutual interest of the parties in the thing to be done, or business relation between them by reason of which, as in this case, appellee was rightfully on appellant's premises. The question here does not involve the distinction between services rendered to another in an employment, and one which, though helpful to another, is performed alone for the purpose of promoting one's own interest, which was the turning point in Huntzicker v. Ill. Cent. R. Co. (—) 129 Fed. 548, cited by appellant.

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Finally, it is insisted that the verdict is not sustained by sufficient evidence. Appellant in support of this contention insists that under the evidence this was a case within the Federal Act, and therefore the verdict was contrary to law. The evidence is undisputed. We have carefully considered it and conclude that what we have said, in ruling on other points presenting this same question, is more or less applicable to the points made in support of this assignment. Without further extending this opinion, we hold that appellant's insistence on the evidence must be denied.

Judgment affirmed.

It is therefore considered by the Court that the judgment of the court below in the above entitled cause be in all things affirmed at the cost of the appellant all of which is ordered to be certified to said Court.

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And it is further considered by the Court that the appellee recover of the appellant the sum of $— for his costs and charges in this behalf expended.

And afterwards, towit: On the 9th day of May, 1922, the same being the 140th juridical day of the November Term, 1921, of said Supreme Court the following further pleas and proceedings were had herein:

Comes now the appellant by counsel and files its petition and brief (8) for a rehearing herein, which petition is in the words and figures following:

193 In the Supreme Court of Indiana.

#23536.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY

vs.

GUERNEY O. BURTCH.

Appeal from the Jackson Circuit Court.

Petition for Rehearing.

The appellant in the above entitled cause respectfully petitions the Court to grant a rehearing herein.

It respectfully represents that the Court in its opinion erred upon the following points and each of them, towit:

First. In holding that the demurrer to first paragraph of complaint was properly overruled.

Second. In holding that the demurrer to second paragraph of complaint was properly overruled.

Third. In holding that either paragraph alleges such an emergency as permitted the conductor to employ appellee and bind the appellant.

Fourth. In holding that it was not error to admit evidence to explain or modify the tariff rule involved.

Fifth. In holding that appellee was an employee for some purposes and not for all purposes.

Sixth. In holding that the conductor could waive the rule fixed by the tariff.

Seventh. In holding that a custom established by employees of appellant could nullify the tariff regulation.

Eighth. In holding that evidence of a custom was admissible when not pleaded.

Ninth. In holding that the Federal Employers' Liability Act did not govern.

(Signed) McMULLEN & McMULLEN,
Attorneys for Appellant.

194 (Endorsed:) #23536. Appealed from the Jackson Circuit Court. The Baltimore and Ohio Southwestern Railroad Company, Appellant, vs. Guerney O. Burtch, Appellee. Petition for Rehearing. Filed May 9, 1922. Patrick J. Lynch, Clerk. McMullen & McMullen, Attorneys for Appellant.

And afterwards, towit: On the 8th day of June, 1922, the same being the 16th day of May Term, 1922, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties, and the Court being advised in the premises, modifies mandate in the above entitled cause heretofore rendered.

195 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Come now the parties by counsel, and the Court being sufficiently advised in the premises denies the petition for rehearing heretofore filed herein by appellant and orders judgment for the appellee herein.

196 STATE OF INDIANA:

In the Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the Supreme Court of Indiana in cause No. 23536, The Baltimore and Ohio Southwestern Railroad Company vs. Guerney O. Burtch.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court, at the city of Indianapolis, this 18th day of August, 1922.

[Seal of Supreme Court State of Indiana, MDCCCXVI.]

PATRICK J. LYNCH,
Clerk of Supreme Court of Indiana.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Indiana, Greeting:

Being informed that there is now pending before you a suit in which The Baltimore & Ohio Southwestern Railroad Company is appellant, and Guerney O. Burtch is appellee, No. 23536, which suit was removed into the said Supreme Court by virtue of an appeal from the Jackson Circuit Court, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 29,127. Supreme Court of the United States, No. 577, October Term, 1922. The Baltimore & Ohio Southwestern Railroad Company vs. Guerney O. Burtch. Writ of Certiorari.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 577.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, Petitioner,

vs.

GUERNEY O. BURTCH, Respondent.

The Writ of Certiorari in the above entitled case having been granted to the above entitled petitioner to review the judgment and decision of the Supreme Court of the State of Indiana in the above case, in which The Baltimore and Ohio Southwestern Railroad Company was Appellant and Guerney O. Burtch was Appellee.

Now it is therefore stipulated and agreed between counsel for the above named petitioner and counsel for the above named respondent that the Transcript of Record of the said Supreme Court of Indiana in said cause now on file in the Supreme Court of the United States

be taken as a return to the said writ and that the Clerk of the Supreme Court of Indiana forward a certified copy of this stipulation to the Clerk of the Supreme Court of the United States forthwith, as his return to the said Writ of Certiorari.

Done the 23rd day of December, A. D. 1922. Morrison L. Waite, Counsel for Above Petitioner. Oscar H. Montgomery, Counsel for Above Respondent.

[Seal of the Supreme Court of Indiana.]

Filed Dec. 28, 1922. Patrick J. Lynch, Clerk.

Supreme Court of Indiana.

December 28, 1922.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now on file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written. [Seal of the Supreme Court of Indiana.] Patrick J. Lynch, Clerk of the Supreme Court of Indiana.

[Endorsed:] 577/29,127.

[Endorsed:] File No. 29,127. Supreme Court U. S. October Term, 1922. Term No. 577. Baltimore & Ohio S. W. R. R. Co., Pet'r, vs. Guerney O. Burtch. Writ of certiorari & return. Filed Jan. 2, 1923.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

GUERNEY O. BURTCH, RESPONDENT.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

GUERNEY O. BURTCH, RESPONDENT.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

I.

Preliminary Statement.

This brief is intended to be supplemental to the brief that was filed at the time the petition was filed.

II.

Points and Authorities.

1. Respondent was engaged in interstate commerce at the time of his injury.

N. Y. C. and H. R. R. Co. *v.* Carr, 238 U. S., 260.
Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

2. The handling of interstate shipments by a carrier and the relations between such carrier and employees in connection with such a shipment are governed by the Federal law.

Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

3. The tariffs of a carrier filed with the Interstate Commerce Commission have the same force and effect as a statute.

Keogh *v.* Chicago & Northwestern Railway Company *et al.*, — U. S., —; s. c., 43 Supreme Court Reporter, 47.

4. Tariffs of a carrier filed with the Interstate Commerce Commission cannot be changed or modified by the carrier or shipper.

Keogh *v.* Chicago & Northwestern Railway Company *et al.*, — U. S., —; s. c., 43 Supreme Court Reporter, 47.

III.

Argument.

a. The Jurisdiction of This Court.

When all the evidence in the record is considered on the question of the character of the shipment, we submit that there can be no doubt of the shipment being interstate. The answers to the interrogatories alone do not control, for all the evidence on the point must be considered. Not only did

the witness Lurton say (Record, page 59) that the cutter was shipped from a warehouse in Louisville, but he also said (Record, page 60) that the bill of lading was made out to him from Louisville to Commiskey.

Then the witness Hartwell (Record, page 41) said that the train involved came from Louisville, and that this cutter was in one of the cars on that train that came from Louisville.

Moreover, this is all the evidence on the point, and it is not contradicted in any way.

We submit that this evidence establishes not only that the train but that the car and the shipment as well came from Louisville at the same time, and that therefore the shipment was interstate.

But, even if we assume for the present that the shipment was being moved wholly between points in the State of Indiana in an interstate train, nevertheless the case is controlled by the Federal law. We contend that under the facts in this case the decision in New York Central and Hudson River Railroad Company *v.* Carr, 238 U. S., 260, is controlling. There the plaintiff, a brakeman, was injured while cutting off the engine after delivering on a side track two cars moving wholly between points in the State preparatory to the engine returning to the rest of the train that had cars coming from without the State. We believe that there can be no vital distinction here between a car and a single shipment.

Moreover, a train containing both State and interstate shipments is an interstate train.

Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

b. Burtch was One of the Owners of the Shipment.

Here again we must not stop at the interrogatories, but must consider the whole record. The answer to the first interrogatory (Record, page 16) is not controlling. The witness Lurton, through whom the shipment was purchased, said (Record, page 60) that Burtch was one of a company of farmers to whom it had been sold.

Moreover, in the petition (Record, page 4) it is alleged "that plaintiff and six of his neighbors had bought said machine, and he was present upon the arrival of said train to receive said machine, and had arranged to use the same upon his farm the following day."

Rule 8-*b* of the classification, which is a tariff, does not name the consignee (Record, page 92), but puts the obligation upon the owners of shipments to load and unload if the shipments are too heavy for the carrier's loading and unloading facilities.

c. The Instructions of the Trial Court.

Assuming, for the purposes of the argument, that the instructions requested by the railroad company are not artistically drawn, nevertheless the failure of the trial court to give any instruction based on the interstate phase of the case establishes error. The objection made to these instructions was not that the law was wrong as applied to an interstate case, but that there was no interstate case. See in this connection the opinion of the State Supreme Court (Record, pages 107, 108, 109).

Moreover, the court not only did not give any instructions

based on the interstate character of the shipment, but submitted the case on the theory that the State law controlled. See here, particularly, instruction No. three (3) (Record, page 25). This instruction is based squarely on section three (3) of the State Liability Law. This statute is printed in full as an appendix to our brief filed with the petition.

Our proposed instruction No. eight (8) (Record, page 28), which was refused, was based on the interstate character of the shipment. As the duty rested on Burtch, under Rule 8-*b*, to unload, his act in selecting the timbers preparatory to unloading was his individual act, for which he was responsible.

The second paragraph of the complaint is based upon Burtch being at the station to receive the shipment. This is supported by the evidence. See the testimony of the witness Moppin (Record, page 62) and of the witness Arbuckle (Record, page 70). He was an owner and as such was obligated to unload. This duty could not be waived as assumed by instruction number 5½. In Keogh *v.* Chicago & Northwestern Railway Company, 43 Supreme Court Reporter, 47, this Court said:

> "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

Conclusion.

It must be borne in mind that the Supreme Court of the State (Record, page 98) affirmed the position taken by the trial court on all points, especially the one as to the State character of the shipment (Record, pages 107, 108). It is our contention that the case should have been tried on the

theory that the shipment was interstate, and that the Federal law applied, and for that reason that the State court should be reversed.

Respectfully submitted,

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

No. 115

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES

The Baltimore and Ohio Southwestern Railroad Company, Petitioner.

vs.

Guerney O. Burtch, Respondent.

Petition and Brief for Writ of Certiorari to the Supreme Court of the State of Indiana.

Morison R. Waite,
Harry R. McMullen,
Cassius W. McMullen,
William A. Eggers,

Attorneys for Petitioner.

No. 577.

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, Petitioner, vs. GUERNEY O. BURTCH, Respondent.	PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of The Supreme Court of the United States:

Your Petitioner, The Baltimore and Ohio Southwestern Railroad Company, respectfully shows as follows:

Guerney O. Burtch, in an action brought in the Circuit Court of Jackson County, State of Indiana, sought to recover damages against The Baltimore and Ohio Southwestern Railroad Company for personal injuries received in unloading a shipment of freight. The trial resulted in a verdict for the plaintiff below and judgment for Eight Thousand

($8,000.00) Dollars. Upon the pleadings and the bill of exceptions duly set out the case was taken to the Supreme Court of the State of Indiana, which affirmed the judgment March 14, 1922, (134 Northeastern Reporter 858). A petition for rehearing was denied by the Supreme Court of the State, June 8th, 1922, this being the final step available to your Petitioner in the State Courts.

The shipment involved originated at Louisville, Ky., and was destined to Comiskey, Ind. It consisted of an ensilage cutter that weighed about two thousand (2,000) pounds. While it was ordered through a local dealer at Comiskey from a wholesale house at Indianapolis, the plaintiff and others were the owners and were on hand upon the arrival of the train on the day of the accident, prepared to receive it. The crew of the local freight train handling the shipment found that it was too heavy to unload alone and with an ordinary skid. The train went upon a side track to allow a passenger train by and while standing there the conductor called upon the bystanders to assist in the unloading and requested that planks be brought for that purpose. The plaintiff and another bystander who also was a part owner in the machine responded, went to a nearby saw mill and selected two planks, not the property of the Railroad Company, which were placed against the car door by plaintiff and the other owner, ready for unloading. One of these planks broke when cutter was about two-thirds of the way from car to ground injuring plaintiff.

The first paragraph of the petition is based upon the Indiana Employers' Liability Act, (Acts 1911, page 145, Sections 8020-a, et seq. Burns' 1914) on the theory that the plaintiff became an employe of the Railroad Company by acting on the request of the conductor that he assist in unloading, and on the theory that the Railroad Company not having complied with the provisions of the law was, therefore, deprived of the common law defenses. The negligence alleged was the failure to place the car in a proper position for unloading, the failure to have a sufficient number of men on hand to unload the shipment, and the failure to have proper appliances for that purpose and the furnishing of a defective skid without making a proper examination thereof.

The second paragraph of the petition alleged the same ground of negligence, but is based upon the common law rather than statutes.

The trial court adopted the theories of the complaint and, among others, the court gave to the jury the following instructions:

> "No. 1. If you find that upon arrival of defendant's local freight train at the station of Comiskey, Indiana, on October 24th, 1917, carrying the ensilage cutter, as alleged in the complaint herein, such machine was so heavy as to make it unsafe for the regular crew upon said train and at said station in defendant's employ at the time, to attempt to unload the same and that an emer-

gency existed authorizing the conductor to call to his aid additional assistance, and if in these circumstances the conductor in charge of said train acting in line of his duty and on behalf of defendant requested bystanders, including plaintiff Guerney O. Burtch to assist in unloading said machine and in response to said request plaintiff did undertake to assist in said work, then defendant owed to plaintiff while so engaged the same duty of care that it owed to a laborer regularly in its employ while engaged in the same or similar work, and plaintiff was while so working an employee of defendant's although not expecting compensation."

"No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at that time defendant was engaged in operating a railroad in this state and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was injured while under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said conductor and caused by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries, and your verdict should be for the plaintiff."

"No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at that time defendant had in its employ and engaged in conducting its said business in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exercise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

The Railroad Company requested that instructions be given the jury on the theory that the case was controlled by the Federal Employers' Liability Ast (Act April 22, 1908, 35 Stat. 65, Secs. 8657, et seq. U. S. Comp. Stat.) because the shipment at the time of the accident was an interstate shipment, and that if the relationship of master and servant existed between the plaintiff and the Railroad Company, the obligation of the Railroad Company was controlled by the Federal law.

The instructions requested on this point, but which were refused are as follows:

"No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky to Comiskey and other points in Indiana I charge you that this was an interstate shipment and said trains and employees were engaged in interstate com-

merce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk."

"No. 8. If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured he cannot recover and your verdict must be for defendant."

The Railroad Company likewise set up that the duties as to unloading were governed by rule 8-b of the Official Classification at that time filed both with the Public Service Commission of Indiana and with the Interstate Commerce Commission as a tariff, the rule in question reading:

"Owners are required to load and unload heavy or bulky freight carried at L.C.L. ratings that cannot be handled by

> the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling."

The trial court permitted evidence to be introduced over the objection of the Railroad Company showing that the Railroad Company customarily disregarded this rule. On that point it gave an instruction as requested by the plaintiff, and which read:

> "No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a traffic rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an actionable injury sustained by one of its employees merely because of such rule."

It refused to give the following instruction on this point, requested by defendant:

> "No. 11. A published rate, rule or regulation so long as it is in force, has the effect of a statute and is binding alike on shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect."

The Supreme Court of the State affirmed the judgment on all points. This action of the State courts thus denied to your petitioners rights ac-

corded it under the Federal Employers' Liability Act and the Interstate Commerce Act.

Your Petitioner insists that the case should have been submitted to the jury on the theory that the shipment was an interstate shipment and that its interstate character had not terminated at the time of the accident, and that if the relationship of master and servant existed, that relationship was controlled by the Federal law, and that the instructions given by the Court based on the State Statute, which denied the defendant the defenses of assumption of risk and contributory negligence, were erroneously given, and those as to the applicability of the Federal Statute should have been given. Further, because under the tariffs, it was the duty of the plaintiff to have unloaded the shipment and to have furnished appliances for that purpose, therefore, there was no obligation of any sort resting upon the Railroad Company, either to furnish a proper number of men or proper appliances for the purpose of unloading the shipment and the relationship of master and servant did not exist. On either theory the defenses of assumption of risk and contributory negligence were available to the Railroad Company, and the jury should have been instructed accordingly.

Your Petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the State Court and will present its brief for consideration with this petition discussing at greater length the questions involved.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of Indiana, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of proceedings in said Supreme Court in the case therein entitled: "The Baltimore and Ohio Southwestern Railroad Company, Appellant, vs. Guerney O. Burtch, Appellee," and numbered in said Supreme Court, 25,536, to the end that such case may be reviewed and determined by this Court as provided in the acts of Congress in such case made and provided and that the Petitioner may have such relief as this Court may deem proper and that the opinion and judgment of the said Supreme Court of the State of Indiana and said Jackson Circuit Court be reversed by this Honorable Court.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,

HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
MORISON R. WAITE,

Its Attorneys.

State of Ohio, County of Hamilton, SS.

MORISON R. WAITE, being duly sworn on his oath says, that he is one of the counsel for the Baltimore and Ohio Southwestern Railroad Company, Petitioner herein; that the foregoing petition was prepared under his instruction and under his supervision and that he has carefully read the same and believes the allegations therein are true.

MORISON R. WAITE.

Subscribed and sworn to before me this 30th day of August, 1922.

PAUL DEWALD,
Notary Public.
Hamilton County, Ohio.

My commission expires March 25, 1924.

No. 577.

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,

vs.

GUERNEY O. BURTCH,
Respondent.

Petitioner's Brief on Petition for Writ of Certiorari to the Supreme Court of the State of Indiana.

MORISON R. WAITE,
HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

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No. 577.

October Term, 1922.

SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,
vs.
GUERNEY O. BURTCH,
Respondent.

Brief on Behalf of Petitioner,

I

Statement of Facts and Pleadings.

This case originated in the Jackson Circuit Court, Jackson County, Indiana, and was there tried resulting in a verdict and judgment against your Petitioner for $8,000. An appeal to the Supreme Court of Indiana was taken and the judgment was affirmed. A petition for rehearing was filed and heard and on June 8, 1922, the same was denied.

The respondent, with others, had purchased an ensilage cutter to be used by them on their several farms. While respondent was at the station of Comiskey, Indiana, with those (several other men) interested in the cutter, a local freight train, which

had carried the cutter from Louisville, Kentucky, to said station of Comiskey, Indiana, arrived, going upon a side track to allow a passenger train to pass and not upon the station track where cars are unloaded.

The conductor of the train asked the crowd what they were there for and was informed for the ensilage cutter. Whereupon the conductor told them come on back and help unload. Some of these men, including respondent, went to help. The conductor directed the men to get some heavy timbers and respondent and another, likewise interested in the machine, went to a nearby saw mill and got two timbers and put them against the car. When the cutter was about two-thirds of the way from the car to ground, one timber broke, the cutter fell on respondent and injured him.

a—The Complaint.

The respondent's complaint was in two paragraphs, the first of which alleges that it was the duty of the conductor to unload the cutter as it was very heavy; that petitioner had employed only three brakemen who were unable to unload the cutter; that an emergency thereby arose and thereupon the conductor requested respondent to assist; that the petitioner should have provided safe skids but did not and that conductor caused two green and defective planks to be brought and failed to inspect the same and one of them broke allowing the cutter to fall upon and injure respondent.

The second paragraph alleges that respondent and six of his neighbors had bought the ensilage cutter and that respondent was to use the same on the following day; that respondent was present at the station upon the arrival of the train bearing the cutter; that it was the duty of the conductor to unload the cutter as it was heavy, weighing 2,000 pounds; that only three brakemen were employed by the petitioner and were unable to unload the cutter; that petitioner did not provide safe skids and that the conductor caused two green planks to be brought which were defective and conductor failed to inspect the same; that because of respondent's interest in the cutter and with the knowledge and at the request of the conductor he assisted in the unloading of the cutter and while doing so the plank broke and he was injured. (Pt. Rec., p. 2 et seq.)

The complaint failed to allege the interstate character of the shipment and petitioner at its first opportunity, as allowed by the local practice, endeavored by a motion to make more specific to have this shown but the motion was overruled, exception taken and the question presented to the Supreme Court of Indiana, which ruled that the facts sought in the motion were as well known to petitioner as respondent and sustained the ruling of the Jackson Circuit Court. (Pt. Rec., pp. 8-99.)

Your petitioner again presented the question as to the interstate character of the shipment by demurrer to each paragraph of complaint. (Pt. Rec., pp. 9, 10.)

The lower court overruled the demurrer and the Indiana Supreme Court upheld said ruling, holding that the conductor had authority to employ respondent and that petitioner was answerable to respondent thereby for any damages he might receive by reason of negligence of conductor in adopting the means to do the work at hand.

The opinion of the Supreme Court of Indiana will be found in Pt. Rec., p. 98.

The petitioner herein also filed an answer in the Jackson Circuit Court, setting up the facts that the shipment complained of was an interstate shipment and that respondent assumed the risks of his service and also alleged that under Sec. 2 of Rule 8-b it was the duty of respondent or consignee and not the duty of the petitioner to unload freight of the character mentioned in the complaint. (Pt. Rec., p. 12.)

To this a demurrer was filed by respondent and the same was sustained over the exception of petitioner and the question was presented to said Supreme Court of Indiana but was never passed upon by said Court last named.

b—Instructions.

The respondent requested the court below to give to the jury ertain instructions which the trial court gave over the objection and exception of your petitioner and among such given was the following, viz.:

"No. 3. If you find that the plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at that time defendant had in its employ and engaged in conducting its business in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exrecise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

Exception to the above instruction was properly taken and the question was presented to the State Supreme Court which held that as the first paragraph of complaint was based upon the local (state) Employers' Liability statute,* that it would have been error for the lower court not to have given the instruction. (Pt. Rec., p. 26.)

Instruction No. 5½, given by the trial court at the request of plaintiff, reads as follows, viz.:

"No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a tariff rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through a series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an action-

*NOTE—This statute is carried in full as an appendix to this brief.

able injury sustained by one of its employees merely because of such rule." (Pt. Rec., p. 26.)

Exception was duly taken to the giving of this instruction.

The petitioner duly presented certain instructions to the trial court and requested that they be given to the jury. (Pt. Rec., p. 27.)

Among those requested was the following, viz.:

> "No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Comiskey, and other points in Indiana, I charge you that this was an interstate shipment and said train and employees were engaged in interstate commerce and the relations of employees and defendant were governed by the Federal law and not the law of the State of Indiana. I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover, as he must be held to have assumed the risk."

This instruction was refused, exception taken and the question duly presented to the Supreme Court of Indiana, which held that one called specially to assist in unloading a shipment at the point of destination was not engaged in interstate com-

merce although the shipment may have been interstate in character. (Pt. Rec., pp. 29-107.)

Instruction No. 8 requested by petitioner is as follows, viz.:

> "No. 8. If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for the defendant."

This instruction was likewise presented to said last named court and for the same reasons as given in upholding No. 7 this was upheld, the said court simply stating that it was not error to refuse No. 8 and that the case was not one within the Federal Act.

Instruction No. 11 was presented by petitioner to the trial court and refused and duly presented to the Supreme Court and reads as follows, viz.:

> "No. 11. A published rate, rule or regulation, so long as it is in force, has the effect of a statute and is binding alike on

> shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect." (Pt. Rec., p. 28.)

The Supreme Court sustained the trial court in refusing this instruction for the same reasons that it gave in connection with Instructions Nos. 7 and 8 proposed by the railroad company.

c.—The Testimony

Among several other witnesses was one Charles F. Lurton who testified as to the practice of the Petitioners' conductors and train crews calling for assistance in unloading heavy shipments.

Witness Lurton was asked the following question:

> Q. From your knowledge what was the practice while you were agent, of the defendant and its freight conductors in the way of calling for assistance in unloading heavy articles of freight destined to that point.

The Petitioner objected to the above question for the reasons that an emergency is alleged; that it is improper to prove a practice that is contrary to law; improper to prove authority of conductor by custom and no custom is alleged in the complaint, it is prejudicial and the knowledge of witness is too remote. (Acquaintance of witness ceased five years prior to accident.) (Pt. Rec., p. 58.)

The objection was overruled, exception taken and the witness was permitted to answer:

> A. It is a very common occurrence for a train crew to ask some one to help with heavy freight.

The Petitioner moved to strike out the answer for the reasons above given and that the answer was not responsive to the question.

Motion overruled and exception (Ptd. Rec. p. 59.)

There were several other witnesses to the same effect but we present but the one.

O. P. Gothlin was called as a witness by Respondent and was asked the following question.

> Q. You may state what in your experience and knowledge has been the practice of carriers with reference to the disposition of cars or bulky shipments on their arrival at the point of destination, that purports to come under this rule known as 8-b what was the practice in Indiana in October 1917?

Petitioner objected as there was nothing in the pleadings in the case in regard to custom or practice; incompetent to prove practice; any practice indulged in in opposition to the tariff is a violation of law and beyond the power of any railroad; practice must be uniform or we would have one rule in one county and another in another county; it seeks to change

the effect of a written instrument; the question might mean other railroads and is not confined to the defendant in this case and witness is not shown to be qualified to answer question as an expert.

Over the objection of Petitioner the witness answered:

> A. The practice of all carriers, so far as my knowledge goes, in Indiana and every other state, covered by that date and years before, was to place cars for the consignee to unload and bulky shipments which the consignee is required to unload, at an accessible point and to notify the consignee so that he can unload as required by law. (Pt. Rec., pp. 88-89.)

II

Points and Authorities.

1. Respondent was engaged in interstate commerce at time of his injury.

Illinois, &c., R. Co. vs. Porter, 207 Fed. 311.
Erie Co. vs. Shuart, 250 U. S. 465.
Michigan Central R. Co. vs. Owen, 256 U. S. 427.
Yazoo, &c., R. Co. vs. Nichols & Co., 256 U. S. 540.
Gulf, &c., R. Co. vs. Drennan, 204 S. W. 691.
Harris vs. C. N. O. & T. P. R. Co., 197 S. W. 464.
Hines vs. Wicks, 220 S. W. 581.

2. The handling of interstate shipments by a

carrier and the relations between such carrier and employes in connection with such a shipment are governed by the Federal law.

Pryor vs. Williams, 254 U. S. 43.
Seaboard, &c., R. Co. vs. Horton, 233 U. S. 492.
Atchison, &c., R. Co. vs. Harold, 241 U. S. 371.
New Orleans, &c., R. Co. vs. Harris, 247 U. S. 367.

3. The tariffs of a carrier filed with the Interstate Commerce Commission have the same force and effect as a statute.

Pennsylvania R. Co. vs. International &c., Co., 230 U. S. 184-197.
Boston, &c., R. Co. vs. Hooker, 233 U. S. 97.
Atchison, &c., R. Co. vs. Robinson, 233 U. S. 173.
Western, &c., Co. vs. Leslie & Co., 242 U. S. 448.
Louisville &c. R. Co. vs. Maxwell, 237 U. S. 94.

4. Tariffs of a carrier filed with the Interstate Commerce Commission cannot be changed or modified by the carrier and shipper.

G. F. & A. R. Co. vs. Blish Milling Co., 241 U. S. 190.
Baltimore, &c., R. Co. vs. Leach, 249 U. S. 217.
Baltimore, &c., R. Co. vs. New Albany, &c., Co., 48 Ind. App. 647.
Pennsylvania R. Co. vs. International, &c., Co., 230 U. S. 184.
Great Northern R. Co. vs. O'Connor, 232 U. S. 508.

III

Specifications of Error.

1. The Supreme Court of Indiana erred in refusing to hold that the shipment was interstate and that if the relationship of master and servant existed the liability of the Railroad Company was controlled by the Federal Employers' Liability Act, and not by the State law.

2. The Supreme Court of Indiana erred in failing to hold that the tariff placing on the respondent the duty of unloading the shipment had statutory effect and that the obligation of unloading rested upon the respondent and not upon the Railroad Company, and that the Railroad Company could not by any conduct on its part waive this provision of the tariff.

IV

Argument.

There is no dispute as to the facts in this case. The controversy arises solely as to the legal effect so that the questions are entirely those of law. The shipment came from Louisville, Ky., and was destined to Comiskey, Ind. There is no denial that up to the time of the unloading the shipment was an interstate shipment. The theory of the plaintiff, which was adopted by the State courts, was that after the shipment had arrived at Comiskey and the unloading process begun it lost its interstate iden-

tity and thereafter became a state shipment and passed from under the control of the Federal law to that of the State law.

In considering instruction No. 7, as requested by the Railroad Company, the Supreme Court held that in order to bring the respondent under the Federal Employers' Liability Act it was necessary that there be compensation for his service; otherwise, he could not be an employe. They further held that while under Rule 8-b it was the duty of the consignee to unload, nevertheless, there was a universal custom on the part of the carrier to disregard this rule and that when an interstate shipment within Rule 8-b was placed at a point where the consignee could unload, the interstate character thereupon ceased, and that any act by the carrier thereafter with reference to the unloading of the shipment, would not be a furtherance of, or an engaging in, interstate transportation within the meaning of the Federal law. The court concluded that the Railroad Company had placed itself in the dilemma of admitting that it was its duty to unload the cutter and that Rule 8-b did not apply, or that if Rule 8-b did apply the carrier itself had violated the rule. It refused to approve of any defense involving a violation by the carrier of its own rule.

We submit that these views of the State court are unsound, and contend that the shipment was interstate at the time of the accident and that Rule 8-b controlled notwithstanding any alleged violation of the rule on the part of the Railroad Company.

In Michigan Central R. Co. vs. Mark Owen, 256 U. S. 427, the shipment consisted of carloads of grapes placed upon a public delivery track accessible to the shipper. After several baskets had been taken out the question arose as to responsibility for losses occurring during the first forty-eight hours after the shipment had been placed for unloading. This court held:

> "The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

It will be noted that the shipper broke the seal on each of the cars involved, thereby accepting the shipment. This Court held that the shipment was still controlled by the bill of lading and that it was still under the control of the carrier and that its responsibility remained as such.

In Erie R. Co. vs. Shuart et al., 250 U. S. 465, the shipment involved was live stock. The court found the facts to be as follows:

> "Immediately after the car arrived at Suffern, petitioner placed it on a switch track, opposite a cattle chute and left it in charge of respondents for unloading. By letting down a bridge they at once connected the chute and car and were about to

> lead out four horses, when an engine pushed other cars against it and injured the animals therein."

The shipper failed to give notice within five days as contemplated by the bill of lading. The defense was that the bill of lading no longer controlled on the theory that the shipment had been delivered. In answer this court found that the obligation of the carrier had not yet ceased because the animals were simply awaiting removal through a chute owned, operated and controlled by the Railroad Company and that the shipper was still bound by the terms of the bill of lading.

We also call attention at this point to paragraph 3 of Section 1 of the Interstate Commerce Act, 41 Statutes at Large 474, which defines the term "transportation" to include, among other things:

> "All services in connection with the receipt, delivery, elevation and transfer, ventilation, refrigeration, or icing, storage, or handling of property transferred."

In other words, by statutory definition of the scope of the authority of the Interstate Commerce Commission delivery of an interstate shipment is a matter within the jurisdiction of the Interstate Commission, so that incidents in connection with such delivery are incidents of interstate transportation, and therefore subject to control by the Federal law.

We wish briefly to call attention at this point

also to a series of decisions by this court involving the question of whether shipments moving in interstate commerce lose their identity as interstate shipments after they have been put into storage upon arriving at the destination point. This court has held that the parties are bound, while such shipments are in storage, by the terms of the shipping contract, and that the liability is that under the Federal law. In one of these cases, to-wit: Southern Ry. Co. vs. Prescott, 240 U. S. 632, the shipper had gone so far as to remove upon arrival a part of the shipment, leaving the remainder with the Railroad Company in storage. The other two decisions that we have in mind are Cleveland, Cincinnati, Chicago & St. L. Ry. Co. vs. Dettlebach, 239 U. S. 588, and Western Transit Company vs. Leslie & Co., 242 U. S. 448.

There is another series of decisions by this court involving the validity of state statutes which attempted to control in various ways the delivery of interstate shipments. The theory of the states was that the interstate character of the shipment terminated upon its arrival at destination and that the circumstances and details respecting the delivery into the hands of the consignees were matters wholly within the jurisdiction of the State. This court, however, held that the interstate character of the shipments had not yet been divested and that they were still subject to the Federal law.

In St. Louis, Iron Mountain and Southern R. Co. vs. Edwards, 227 U. S. 265, the State sought to

impose penalties for delays in making deliveries of interstate shipments.

In Yazoo and Mississippi Valley R. Co. vs. Greenwood Grocery Co., 227 U. S. 1, the State Railroad Commission of Mississippi promulgated a regulation that freight had to be put in to an accessible place for unloading by the consignee within twenty-four hours after the arrival of the car at destination.

In Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Elevator Co., 226 U. S. 426, the State of Minnesota attempted to enforce a law to furnish cars within limited periods after demand had been made.

In McNeill vs. Southern Railway Co., 202 U. S. 543, the State of North Carolina, through its corporation commission, attempted to enforce an order involving demurrage on cars of coal that had originated in interstate commerce.

In each of these cases this court held that the incident of the delivery of the interstate shipments was controlled by the Federal law and that the states, following statutory action by Congress, no longer had jurisdiction.

In the case now before you the shipment was being taken out of the car. There had not yet been a delivery to or acceptance of the same by the consignee. The car in which it arrived was a part of a local freight train moving from Louisville, Ky., that would continue on its journey through Indiana

as soon as the freight destined for Comiskey was unloaded. For all that appears the shipment might have remained on the premises of the Railroad Company for an indefinite period before its removal. As in the Mark Owen case, some damage or loss may have occured to the shipment during the forty-eight hour period after its arrival at destination after it had been taken from the car and was still on the Railroad Company premises. As we construe the decision of this court in the Mark Owen case, the liability of the carrier for such damage or loss during said forty-eight hour period would have been that of the carrier, and such liability would have continued until the consignees removed the shipment from the Railroad Company premises. In Erie R. Co. vs. Shuart, supra, involving a shipment of live stock, the car had been turned over to the consignees. The damage occurred while they were getting the chute ready preparatory to unloading the animals. Certainly in that case there was a greater control over the shipment by the consignees than in the present case. Again, in the cases involving statutes attempting to regulate the incident of delivery as, for example, McNeill vs. Southern Railway Co., supra, the cars had been placed at specified points ready for unloading by the consignees. Demurrage, of course, is collected by the carrier under interstate tariffs on interstate shipments because of the delay on the part of the shipper in unloading the shipment. In other words, where there is any delay on the part of the shipper in removing a shipment

from the Railroad Company premises, or in unloading the same, the charges, where the shipment was an interstate shipment, are due under tariffs filed with the Interstate Commission, and the collection of such charges could be made in the Federal courts under the Federal law. As to charges generally, this, we submit, has been clearly decided in Louisville & Nashville R. Co. vs. Rice, 247 U. S. 201, and as to charges involving demurrage, in Berwind-White Co. vs. Chicago & Erie R. R., 235 U. S. 371.

Moreover, suppose that one of the crew of the local freight train had become injured while unloading this piece of machinery. Would the liability of the carrier toward him be controlled by the state or by the interstate law? It seems to us clear that the case of such employe would be controlled by the Federal law and that this would be true even though such employe would be acting beyond the scope of his duty in the sense that he was unloading the shipment whereas it should have been unloaded by the consignee. However that may be, the fact remains that the crew of this train was engaged in unloading a shipment which originated in the State of Kentucky and which was being delivered at a point within the State of Indiana, an activity which was interstate in its nature, and which was interstate at the time of the accident and would remain so until the owners removed the shipment from the Railroad Company premises. It hardly needs citation of authority to prove that a railroad employe engaged in unloading or loading a shipment moving in inter-

state commerce is at the time engaged in interstate commerce and that liability of the carrier to such employe is controled by the Federal law. Illinois Central R. Co. vs. Porter, 207 Federal Reporter 311.

The shipment being interstate, as we submit we have demonstrated it to be, it follows that the Supreme Court of Indiana erred in failing to hold that the provisions of Rule 8-b were binding upon the plaintiff and could not be waived by any conduct on the part of the carrier. That a tariff provision has statutory effect was established in Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 134. A provision of the tariff thus on file with the Commission becomes a part of the shipping contract and is binding upon the parties who are interested even though they have no actual knowledge of the tariff. Of the many decisions of this court we think it sufficient to call attention only to Boston & Maine R. R. vs. Hooker, 233 U. S. 97, and Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Company, 241 U. S. 190.

The obvious purpose of publishing a tariff with the Interstate Commerce Commission is to prevent discrimination by the Railroad as between its patrons. If the Railroad by contract, express or implied, obviates or modifies a tariff of any kind in any respect, it, of course, lets itself open to a charge of discrimination, but by so doing it does not relieve the shipper from his duty to comply with the tariff regulation. This, we submit, was decided by this court some years ago in Armour Packing Co. vs.

United States, 209 U. S. 56, this court holding that by the filing of a tariff fixing a charge for certain transportation, the shipper could not thereafter insist upon a rate which had been provided for in a contract made prior to the publication of the tariff. If a shipper could protect himself by an agreement or by declaring that certain conduct of the carrier amounted to a waiver or created an estoppel, the purpose of publishing a tariff would be defeated. Certainly, no such easy method of evasion was contemplated when Congress passed the Interstate Commerce Act. This court, in A. J. Phillips Company vs. Grand Trunk Western Ry. Co., 236 U. S. 662, held that the prohibitions of the Interstate Commerce Act against unjust discrimination related to preferences that might be given by means of consent judgments or waivers of defenses. So, too, in this case we think that the prohibitions of the Interstate Commerce Act extends likewise to the conduct of the Railroad Company in this case in assisting to unload the shipment. It seems to us to follow that if the Railroad Company waived the tariff provision by assisting as it did in this case, it could, by refusing to assist another customer, discriminate. Nor does it seem to us to follow that even if a custom was proved of the Railroad Company assisting in the unloading of all less than carload shipments, the tariff can be waived or annulled by the Railroad Company. The Interstate Commerce Commission is authorized by statute to prescribe rules and regulations for the filing and canceling of tariffs. Unless

the tariff is filed or is canceled as the rule of the Commission prescribes, it cannot become effective or be made void by agreement between the Railroad Company and the shipper, or by conduct on the part of either, or both. If Rule 8-b was in force and effect, as we contend it was, then the duty of unloading rested upon the owner with the result, of course, that there would be no liability upon the Railroad Company because the owner selected the appliances and was in control of the entire situation. If there was any negligence involved it was his, and not that of the Railroad Company.

On the other hand, if the Supreme Court of the State was correct in its position that the relation of master and servant existed then the liability of the Railroad Company must be in accordance with the provisions of the Federal Employers' Liability Act as construed by this court. That the statute in question applies to proper cases arising out of interstate commerce admits of no argument. This court recently decided the point again in Pryor, et al. vs. Williams, 254 U. S. 43. See also New York Central & Hudson River R. Co. vs. Tonsellito, 244 U. S. 360; New York Central R. R. Co. v. Winfield, 244 U. S. 147, and Erie R. R. Co. vs. Winfield, 244 U. S. 170. The State court overruled the Railroad Company's demurrer to the first paragraph of the complaint, holding that the plaintiff was an employe. The Supreme Court of the State found that there was no error in the instructions given by the trial court based upon the Employers' Liability Act of the State

of Indiana.* The trial court's instructions to the jury under the State Liability Act read as follows:

> "No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at that time defendant was engaged in operating a railroad in this State and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was so injured while employed under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said conductor and caused by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries and your verdict should be for the plaintiff."
>
> "No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of this complaint, and that at that time defendant had in its employ and engaged in conducting its said business in this State more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exercise of ordinary

* The statute is carried in full as an appendix to this Brief.

> care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

We submit that it is clear from the foregoing that the State courts did not accord to the Railroad Company its full rights under the Federal law when it failed to find that the shipment was interstate at the time of the accident. This, we think, resolves the case into alternatives. If we assume, on the one hand, that the relationship of master and servant existed, then the State court erred in not applying the Federal Employers' Liability Act as construed by this court. On the other hand, if it be assumed that the relationship of master and servant did not exist, then we submit that the State court erred in failing to hold that the provisions of the tariff Rule 8-b conclusively applied; and, of course, if Rule 8-b applied, the responsibility for the unloading rested upon the plaintiff and not upon the Railroad Company. There was fundamental error in the court below in failing to hold that the shipment at the time of the accident was interstate, and that the controversy was controlled by the Federal law. We submit that this would be so, whether the relationship of master and servant existed—in which event the Federal Employers' Liability Act would govern—or whether the relationship of master and servant did not exist—in which event Rule 8-b would control, and the responsibility for the unloading would be cast upon the plaintiff.

It is therefore respectfully submitted that the

decision of the Supreme Court of the State of Indiana in this case is erroneous and that this judgment should be reversed.

MORISON R. WAITE,
HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioners.

APPENDIX.

Laborers---Injuries---Employers' Liability--Damages.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That any person, firm or corporation while engaged in business, trade or commerce within this state, and employing in such business, trade or commerce five or more person shall be liable and respond in damages to any person suffering injury while in the employ of such person, firm or corporation, or in case of the death of such employe, then to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then to such employe's parents; and if none, then to the next of kin dependent upon such employe, where such injury or death resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers, or by reason of any defect, mis-

management or insufficiency, due to his, its or their carelessness, negligence, fault or omission of duty.

Prosecution—Burden of Proof—Negligence.

SEC. 2. In any action prosecuted under the provisions of this act, the burden of proving that such injured or killed employe did not use due care and diligence at the time of such injury or death, shall be upon the defendant, but same may be proved under the general denial. No such employe who may have been injured or killed shall be held to have been guilty of negligence or contributory negligence by reason of the assumption of the risk thereof in any case where the violation by the employer or his, its or their agents or employes, of any ordinance or statute enacted, or of any rule regulation or direction made by any public officer, bureau or commission, was the cause of the injury or death of each employe. In actions brought against any employer under the provisions of this act for injury or death of any employe, it shall not be a defense that the dangers or hazards inherent or apparent in the employment in which such injured employe was engaged, contributed to such injury. No such injured employe shall be held to have been guilty of negligence or contributory negligence where the injury complained of resulted from such employe's obedience or conformity to

any order or direction of the employer or of any employe to whose orders or directions he was under obligation to conform or obey, although such order or direction was a deviation from other rules, orders or directions previously made by such employer.

Risks of Employment.

SEC. 3. That in any action brought against any employer under or by virtue of this act to recover damages for injuries or the death of, any of his, its or their employes, such employe shall not be held to have assumed the risks of the employment in any case where the violation of such employer or his, its or their agents or employes of any ordinance or statute enacted, or of any rule, direction or regulation made by any public officer or commission, contributed to the injury or death of such employe; nor shall such injured employe, be held to have assumed the risk of the employment where the injury complained of resulted from his obedience to any order or direction of the employer or of any employe to whose orders or directions he was under obligations to conform or obey although such order or direction was a deviation from other orders or directions or rules previously made by such employer. In any action brought against any employer under the provisions of this act to recover damages for injuries to or the death of, any of his, its or their employes, such employe shall not be held to have

assumed the risk of any defect in the place of work furnished to such employe, or in the tool, implement or appliance furnished him by such employer where such defect was, prior to such injury, known to such employer or by the exercise of ordinary care might have been known to him in time to have repaired the same or to have discontinued the use of such defective working place, tool, implement or appliance. The burden of proving that such employer did not know of such defect, or that he was not chargeable with knowledge thereof in time to have repaired the same or to have discontinued the use of such working place, tool, implement or appliance, shall be on the defendant, but the same may be proved under the general denial.

Judgment—Surviving Right of Action.

SEC. 4. The damages recoverable under this act shall be commensurate with the injuries sustained, and in case death results from such injury, the action shall survive: *Provided,* That where any such injured person recovers a judgment under the provisions of this act and an appeal is taken from such judgment, and pending such appeal, the injured person dies and said judgment be thereafter reversed; or where such injured person dies after said judgment is reversed and before trial, the right of action of such person shall survive to his or her personal representative, and such action may be continued in the name of such personal representative, for the benefit of the person entitled under this act to receive the same.

Exempting Contract Void—Set-Off.

SEC. 5. That any contract, rule, regulation, by-law, or device whatsoever, the purpose, intent, or effect of which would be to enable any employer to exempt himself or itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such employer under or by virtue of any of the provisions of this act, such employer may set off therein by special plea any sum such employer has contributed or paid to any insurance, relief benefit, or indemnity for and on behalf of such injured employe that may have been paid to him or to the person entitled thereto on account of the injury or death for which said action is brought, but in no event shall the amount of such set-off exceed the amount paid to such employe or other person entitled thereto out of such insurance, relief benefit or indemnity fund.

Maximum Death Liability.

SEC. 6. That where any action is brought on account of the death of any person under this act, the liability of any such employer shall not exceed $10,000, and the provisions of the law now in force as to parties plaintiff shall apply.

Questions of Fact in Trial.

SEC. 7. All questions of assumption of risk, negligence or contributory negligence shall be ques-

tions of fact for the jury to decide, unless the cause is being tried without a jury in which case, such questions shall be questions of fact for the court.

Limitation of Action.

SEC. 8. That no action shall be maintained under this act unless the same is commenced within two years from the date the cause of action accured.

Receivers Included.

SEC. 9. That the terms "employer," "persons," "firm," and "corporation" shall include receivers or other persons charged with the duty of managing, conducting or operating business, trade or commerce.

Not Retroactive—Pending Litigation.

SEC. 10. This act shall not apply to injuries received by any employe before the passage of the same nor affect any suit or legal proceedings pending in any court at the time of its passage.

Act Supplemental.

SEC. 11. This act shall be construed as supplemental to all laws and parts of laws now in force concerning employers and employes, and shall repeal only such laws and parts of laws as are in direct conflict with the provisions of this act. That nothing in this act shall be held to limit the duty

or liability of employers or to impair the rights of their employes under the common law or any other existing statute or to affect the prosecution of any pending proceeding or right of action now existing.

Emergency.

SEC. 12. Whereas, an emergency exists for the immediate taking effect of this act, this act shall be in force from and after its passage.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA BURTCH, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF FOR RESPONDENT.

The Writ of Certiorari Should be Dismissed.

The writ of certiorari should be dismissed for lack of jurisdiction. The only ground of Federal jurisdiction in this case is the claim of petitioner that the ensilage cutter was being transported in interstate commerce at the time of the accident. *The jury expressly found that there was no evidence on this point.* (Record, page 17.)

Petitioner, upon the trial, submitted to the jury certain interrogatories to be answered in case a general verdict was returned, and among them were the following: "Eight. Did said car come in said train from Louisville, Kentucky, to Commiskey? Answer. Train came from Louisville. No evidence where car came from." "Did said cutter come to said Commiskey in said car from Louisville, Kentucky? Answer. No evidence." (Record, page 17.)

In the case of *United States Shipping Board Emergency Fleet Corporation v. Sullivan* (261 U. S., 146), this court dismissed the writ of error and denied a writ of certiorari where the State courts held that there was no evidence to establish the facts necessary to show Federal jurisdiction under section 237 of the Judicial Code. The present case is exactly similar. In the Sullivan case, Sullivan sued the United States Emergency Fleet Corporation for damages for personal injury. The claim of defendant was that Sullivan was a Federal employee and hence action should have been under the Federal Employers' Liability Act. The State courts found no evidence to substantiate this claim. In the present case the State court found no evidence showing the ensilage cutter was being transported in interstate commerce at the time the accident occurred. The claim of Federal jurisdiction is so frivolous that the writ of certiorari should be dismissed. As stated by Mr. Justice McReynolds in the case of *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U. S., 430:

> Petitions for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the

court may upon motion by a party or *ex mero motu,* dismiss the writ.

St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S., 265, 276.

Respondent's Answer to Specifications of Error.

The respondent, answering petitioner's specifications of error, severally says:

1st. That the shipment in this case was not shown by the evidence to be an article of interstate commerce, and petitioner's tendered instructions were not applicable to the evidence and were also erroneous in substance.

2d. Respondent's decedent was not the consignee of the shipment and was not in any way obliged to unload or assist in unloading the same; but was called into the service of petitioner in the performance of an act which its representative determined to be a part of its duties as carrier. Petitioner is liable to an employe injured by its negligence in such circumstances, although it might have decided that the shipment was excessively heavy and declined to unload the same.

Correction of Statements in Petitioner's Brief.

1. The shipment of the ensilage cutter involved in this case, which petitioner claims was an interstate shipment, is not shown to have originated at Louisville, Kentucky, and to have been carried by it to Commiskey, Indiana, by the train and employees charged with respondent's injuries; but, on the contrary, the place at which the ensilage cutter was taken into the train is *not* disclosed by the evidence.

Charles F. Lurton, the only witness upon this point, testified as follows: "Q. From where did you obtain it (the ensilage cutter)? A. Through an Indianapolis concern, but it was shipped from a warehouse in Louisville." (Record, page 59.)

Petitioner, upon the trial, submitted to the jury certain interrogatories to be answered in case a general verdict was returned, and among them were the following: "Eight. Did said car come in said train from Louisville, Kentucky, to Commiskey? Answer. Train came from Louisville. No evidence where car came from." "Did said cutter come to said Commiskey in said car from Louisville, Kentucky? Answer. No evidence." (Record, page 17.)

2. The ensilage cutter did not belong to respondent's decedent and other farmers, and he did not go to the train to get it. (Record, page 16.)

Points and Authorities.

I.

First Paragraph of Complaint.

One who, at the request of the conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in unloading a heavy machine from one of its cars, the regular crew not being reasonably able to unload the same, is for the time being the servant of the carrier and entitled to the same protection as any other servant.

St. Louis, etc., R. R. Co. *v.* Bagwell, 33 Okla., 189; 40 L. R. A. (N. S.), 1180;

Aga *v.* Harbach, 127 Ia., 144; 109 Am. St. Rep., 377; 4 Ann. Cas., 441;

Fox *v.* Chicago, etc., R. Co., 86 Ia., 368; 17 L. R. A., 289;
Sloan *v.* Central Iowa R. Co., 62 Ia., 728;
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Marks *v.* Rochester R. Co., 146 N. Y., 181; 40 N. E., 782;
Georgia P. R. Co. *v.* Propst, 83 Ala., 518;
Jackson *v.* Southern R. Co., 73 S. C., 557;
Louisville & N. R. Co. *v.* Ginley, 100 Tenn., 472;
W. H. Neill Co. *v.* Rumpf, 148 Ky., 807;
Street Ry. Co. *v.* Bolton, 43 Ohio St., 224;
Haluptzok *v.* Great Northern R. Co., 55 Minn., 446; 26 L. R. A., 739;
Maxson *v.* J. I. Case, etc., Co., 81 Neb., 546; 16 L. R. A. (N. S.), 963.

II.

Second Paragraph of Complaint.

A person not an employee having an interest in a proper way in work in charge of a master's servants, who at the request or with the consent of such servants undertakes to assist in the work, is not a volunteer and does not do so at his own risk; and if he is injured by the carelessness of such servants the master is responsible in tort.

Holmes *v.* Northeastern R. Co., L. R., 4 Exch., 254;
Wright *v.* London & N. W. R. R. Co., L. R., 1 Q. B. Div., 252;

Rink *v.* Lowry, 38 Ind. App., 132;
Empire Laundry, etc., Co. *v.* Brady, 60 Ill. App., 379;
Street Ry. Co. *v.* Bolton, 43 Ohio St., 224;
Welch *v.* Maine Central R. Co., 86 Me., 552;
Meyer *v.* Kenyon-Rosing, etc., Co., 95 Minn., 329;
Kelly *v.* Tyra, 103 Minn., 176; 17 L. R. A. (N. S.), 334;
McConnell *v.* Pennsylvania R. Co., 223 Pa., 442;
Louisville, etc., R. Co., *v.* Ward, 98 Tenn., 123;
Eason *v.* Sabine & E. T. R. Co., 65 Tex., 577; 57 Am. Rep., 606;
Weatherford, etc., R. Co. *v.* Duncan, 88 Tex., 611.

III.

MOTION FOR NEW TRIAL, REASONS 1-5.

The long-continued practice and custom of petitioner's conductors in calling bystanders to assist in unloading heavy articles of freight showed its interpretation of its duty under traffic regulations, consent to, and ratification of such acts by its agents, and was and is competent evidence.

Haluptzok *v.* Great Northern R. Co., 55 Minn., 446; 26 L. R. A., 739;
Leavenworth Electric R. Co. *v.* Cusick, 60 Kan., 597.

IV.

MOTION FOR NEW TRIAL, REASONS 6-11.

The practical construction given to a statute or rule by officers charged with its execution will always be regarded

by the courts, and long-continued usage is equivalent to positive law. O. P. Gothlin was a competent witness, and had a right to testify to the general practice and usage with reference to the traffic rule in question.

Board of Commissioners *v.* Bunting, 111 Ind., 143;
State *ex rel. v.* Harrison, 116 Ind., 300;
Logansport Credit Exchange *v.* Sands, 54 Ind. App., 562.

V.

Motion for New Trial, Cause 17.

Instruction No. 7 tendered and requested to be given by petitioner reads as follows:

> "No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Commiskey, and other points in Indiana, I charge you that this was an interstate shipment and said train and employees were engaged in interstate commerce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover, as he must be held to have assumed the risk." (Rec., 28.)

1. An article shipped from one point to another within a State, although shipped in a train running from one State

to another, is not an interstate shipment, and this instruction is not a correct statement of the law upon that point.

Luken *v.* Lake Shore, etc., R. Co., 248 Ill., 377; 21 Ann Cas., 82;

McCutchen *v.* Atlantic Coast Line R. Co., 81 S. C., 71;

St. Louis, etc., R. Co. *v.* True Bros., Tex. Civ. App., —; 140 S. W., 827.

2. The jury having expressly found that there was no evidence that the ensilage cutter was an interstate shipment, this instruction was not applicable to the evidence, and was for that reason rightfully refused.

Cleveland Ry. Co. *v.* Gossett, 172 Ind., 525;

Terre Haute Electric Co. *v.* Roberts, 174 Ind., 351;

Cleveland Ry. Co. *v.* Case, 174 Ind., 369;

Domestic Coal Co. *v.* De Armey, 179 Ind., 592.

3. This instruction is further erroneous in charging that "if plaintiff could have known the weakness of planks used," he could not recover. An employee is not bound at his peril to know the safety of appliances used, and is only required to exercise ordinary care to discover defects while giving attention to the performance of his duties as an employee; and assumption of the risk in any given case is not a question of law, but a question of fact for the jury, under proper instructions from the court.

Central Vt. Ry. *v.* White, 238 U. S., 507;

Gila Valley Ry. Co. *v.* Hall, 232 U. S., 94;

Diezi *v.* Hammond Co., 156 Ind., 583, 587;

Rogers *v.* Leyden, 127 Ind., 50;

Ambre *v.* Postal Tel. Cable Co., 43 Ind. App., 47.

VI.

Motion for New Trial, Cause 17.

Instruction No. 8, tendered and requested to be given by petitioner, reads as follows:

> "If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter, and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose, and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for the defendant."

1. This instruction is not applicable to the evidence, as declared by the jury; and it erroneously assumes that respondent's decedent was, at the time, an interstate employee and subject to the Federal Employers' Liability Act. The court must not in an instruction, assume as true any fact in dispute.

Southern Ry. Co. *v.* Limback, 172 Ind., 89;
Beery *v.* Driver, 167 Ind., 127;
Louisville, etc., T. Co. *v.* Cotner, 71 Ind. App., 377.

2. This instruction is fundamentally wrong, since it is not enough to defeat an injured employee that he had an opportunity to see and examine an appliance by which he was injured, but he must also know and appreciate all the con-

ditions of its use and its fitness for the same. This latter element is wholly omitted from the instruction. It is the master's duty to furnish safe and suitable appliances; and assumption of the risk is not a question for the court, but a matter of fact for the jury.

Seaboard Air Line Ry. Co. *v.* Horton, 233 U. S., 492, 501;

Standard Forgings Co. *v.* Saffel, 176 Ind., 417;

Romona Stone Co. *v.* Shields, 173 Ind., 68;

Ross *v.* May, — Ind. App., —; 140 N. E., 581.

VII.

Assumption of Risk.

Petitioner's conductor, Jackson, examined and tested the timbers, and thereupon assured respondent's decedent that they were sufficient, and "would hold"; in these circumstances there can be no assumption of the risk unless the danger is obvious and fully appreciated.

Bradbury *et al. v.* Goodwin, 108 Ind., 286;

M.-H. Basket Machine Co. *v.* Lyon, etc., 28 Ky. Law Rep., 471;

Chesapeake & O. Ry Co. *v.* Shepherd, 153 Ky., 350

Berube *v.* Horton, 199 Mass., 421;

Burkard *v.* Rope Co., 217 Mo., 466;

Galveston, H. & S. A Ry. Co. *v.* Sanchez, 57 Tex. Civ. App., 87.

IX.

Right Result.

It is manifest that if any technical error was committed by the trial court it was harmless, and that respondent was

clearly entitled to recover, and that a right result was reached. A statute of Indiana provides: "Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

Burns Statutes, 1914, section 700.

ARGUMENT.

The first paragraph of the complaint in this case is supported in every particular by the case of *St. Louis & S. F. R. Co. v. Bagwell,* 33 Okla., 189, and cases therein cited. In that case the court held the complaint good and affirmed a judgment in favor of the plaintiff, stating the legal principle concisely as follows:

> "'The plaintiff was engaged in defendant's work at the request of the conductor in charge of the train, and, although it may be said that his employment was for mere temporary purposes, still, being in defendant's employ at the request of its servant or a conductor who was in charge of the train, an emergency existing reasonably requiring such assistance in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload the same, he was not a trespasser, but, for the time being, the servant of the defendant."

The following quotation from the opinion in the case of *Marks v. Rochester R. Co.,* 146 N. Y., 181, is pertinent to the case at bar:

> "While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted to the jury. The defendant

> gave no evidence upon the point. The conduct of the driver indicates that in his opinion assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated, and which require a servant to act, in the absence of the principal, for the immediate protection of his interests; and he may do things in his interest when the emergency arises which transcend his usual authority, and they will be deemed to have been authorized. The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the horse was the act of the principal, and if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant."

The second paragraph of the complaint proceeds upon the theory that respondent was not an employee of petitioner, but was upon petitioner's right of way with its consent and at its request and expediting the work because of an interest in the shipment being unloaded, and while so engaged was injured by the negligence of petitioner's servants. The authorities abundantly sustain respondent's right of recovery upon this ground. The case of *Kelly v. Tyra,* 103 Minn., 176, supports this principle and cites many other cases. The following quotation from *Welch v. Maine Central R. Co.,*

86 Me., 552, fully states the doctrine and distinction between a mere volunteer and a licensee with an interest:

> "The distinction running all through the cases is this: That, where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.
>
> "This distinction is sustained by the cases cited, and by every modern text-book to which our attention has been called; and we are not aware of a single authority which holds the contrary."

Petitioner objected to proof introduced by respondent to the effect that at Commiskey petitioner's conductors, covering a period of more than 15 years had pursued the practice and established the custom of calling by-standers to assist in unloading heavy articles of freight. This evidence was not only proper, but material and important as tending to prove authority on the part of such conductors to employ extra help

and knowledge and ratification of their acts on the part of petitioner. In the case of *Haluptzok v. Great Northern R. Co.*, 55 Minn., 446, the court with regard to the authority of the servant to employ assistance and his practice in doing so, said:

> "Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on the part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him."

Petitioner sought to shield itself in this case behind a rule permitting it to require the consignee to unload heavy freight shipments. Respondent met this contention by showing that this rule was not operative until the carrier had first placed the car containing such shipment in a suitable and convenient position to be unloaded and had given notice thereof to the shipper. O. P. Gothlin, chief of the tariff bureau of the Public Service Commission of Indiana, and charged with the enforcement of this rule, and familiar with its practical interpretation, testified to such facts. This evidence was entirely competent. The courts of this State have frequently affirmed the principle that great regard will be given by the courts to the practical construction of a statute or rule by

officers charged with its execution. In *Board of Commissioners v. Bunting,* 111 Ind., 143, 145, the court said:

> "We know judicially that it has always been the custom to make suitable provision for the sheriff's residence, and this custom has given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute."

Petitioner's chief complaint is based upon the refusal of the trial court to give two instructions to the jury, tendered by its counsel, and numbered seven and eight. The propriety of giving these instructions as pertinent, and accurate statements of the law, was not discussed by respondent's counsel before the Supreme Court of Indiana, because it was believed and urged upon that court, that they were not properly in the record. Instruction No. 7, requested by petitioner, reads as follows:

> "If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Commiskey and other points in Indiana, I charge you that this was an interstate shipment, and said train and employees were engaged in interstate commerce and the relations of the employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk." (Record, page 28.)

The trial court was justified in refusing to give this instruction for at least three reasons:

1st. It declares that if the ensilage cutter was shipped in a *train* running from Kentucky into Indiana, it was an interstate shipment. So far as the evidence goes, the ensilage cutter may have been taken into this local train at New Albany, Jeffersonville, Charlestown or some other waystation in Indiana, and carried from thence to Commiskey. An article of merchandise carried from one point to another in the same State, although carried by an interstate train, is not an article of interstate commerce. The case of *Luken v. Lake Shore,* etc., R. Co., 248 Ill., 377, expressly decides this point, using the following language:

> "The transportation of property between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which the property is transported, but the character of the traffic that determines whether or not it is interstate or intrastate commerce."

2nd. The jury at petitioner's request in answer to an interrogatory, found that there was no evidence that the ensilage cutter came in the car from Louisville, Kentucky. (Record, page 17.)

This instruction was therefore not applicable to the evidence for that reason was properly refused.

3rd. This instruction is wrong in substance for the further reason that it states the law to be that if respondent's decedent could have known the weakness of the planks used

he must be held to have assumed the risk, and could not recover. This is not the law. It was not shown that decedent knew or might have known the weight of the ensilage cutter or the strength required in the timbers to sustain its weight. The tendered instruction wholly omits these very essential facts. An employee is only required to exercise ordinary care in regard to the safety of appliances furnished by the master, while giving due attention to the performance of his duties as a servant. The circumstances and conditions are very rare, when a court can declare as a matter of law that an injured employee must be held to have assumed the risk; but ordinarily, and in this case, the question of assumption of the risk is a fact to be determined by the jury guided by proper instructions from the court.

Instruction No. 8, requested by petitioner reads as follows:

> "If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby sawmill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for defendant." (Record, page 28.)

This instruction, like No. 7 already discussed, is not applicable to the evidence as declared by the jury. In addi-

tion, it erroneously assumes that the decedent Burtch was an interstate employee; and the court is never permitted, in an instruction, to assume as true any matter in dispute.

2nd. The instruction is erroneous and wrong in substance, since it wholly ignores and omits to mention respondent's lack of knowledge and opportunity to know of the weight of the ensilage cutter, and his ability to appreciate the danger in attempting to unload the same by means of these timbers. Furthermore, it was not proper for the court to give a mandatory instruction on the assumption of the risk, but that question must be determined by the jury as any other fact.

An employee's right to recover for an injury caused by a defective appliance cannot be defeated merely because he had an opportunity to see and examine such appliance. He must also know and appreciate the danger and hazard to be encountered from its use in the particular instance and circumstances.

In the case of *Gila Valley Ry. Co. v. Hall*, 232 U. S., 94, 101, this court, upon that point, said:

> "Moreover, in order to charge an employee with the assumption of a risk attributable to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the dangerous condition, but that he knew that it endangered his safety; or else the danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. If with this actual or constructive knowledge he remains in the service and encounters the danger, he will be held to have assumed the risk."

In the case at bar petitioner's conductor, Jackson, knew the weight of the ensilage cutter; knew the conditions, and the manner in which it was to be unloaded, and with this knowledge inspected and examined the timbers, and thereupon said "they would hold." (Record, page 76.) This assurance on the part of petitioner's representative absolved the respondent thereafter from any charge of assumption of the risk.

Finally, we insist that, except as to the amount of damages, which is too small, the verdict of the jury is manifestly right. Petitioner does not seriously contend that the judgment cannot justly rest upon the second paragraph of complaint, which in no way depends upon the Federal Statute. In view of the answers of the jury to special interrogatories, it is equally clear that if petitioner's refused instructions had been given, the result would have been the same. In these circumstances, we submit that the statute of Indiana should be applied, which provides, that no judgment shall be reversed in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.

The writ of certiorari should be dismissed or the judgment below affirmed.

Respectfully submitted,

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Of Counsel.

(1003)

Appeal dismissed.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* BURTCH, ADMINISTRATRIX OF BURTCH.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 115. Argued December 3, 4, 1923.—Decided January 7, 1924.

1. In determining whether a case appealed from a state court should have been governed by the Federal Employers' Liability Act, uncontradicted evidence establishing the interstate character of a shipment must prevail here over the special findings and general verdict of the jury. P. 543.

2. Authority of the conductor of a freight train to employ a bystander to assist in unloading heavy freight may be derived from custom and the exigency of the occasion. P. 543.
3. The unloading, at destination, of an interstate shipment, by employees of the carrier, is so closely related to interstate commerce as to be practically a part of it. P. 544. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.
4. The liability of an interstate carrier for an accident suffered by a part owner of a heavy article of freight while assisting, as the carrier's employee, in unloading it from the car, was not affected by the existence of a rule filed by the carrier with the Interstate Commerce Commission requiring owners of such articles, under stated conditions, to unload them, since the rule did not affect the relations between the carrier and its employees, but must be observed only to prevent discrimination among shippers, and failure to enforce it was no part of the cause, but was merely an attendant circumstance, of the accident. P. 544.

134 N. E. 858, reversed.

CERTIORARI to a judgment of the Supreme Court of Indiana, affirming a judgment, for personal injuries, recovered by the respondent's intestate in an action against the petitioner.

Mr. William A. Eggers, with whom *Mr. Morison R. Waite*, *Mr. Harry R. McMullen* and *Mr. Cassius W. McMullen* were on the briefs, for petitioner.

Mr. Oscar H. Montgomery, with whom *Mr. T. Harlan Montgomery*, *Mr. Merrill Moores* and *Mr. Wm. J. Hughes* were on the brief, for respondent.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action brought by Guerney O. Burtch against the Railroad Company to recover damages for a personal injury suffered, as a result of the company's negligence, while he was engaged in assisting to unload a heavy ensilage cutter from a freight train at Commiskey, Indiana.

After the allowance of the writ of certiorari Burtch died and his administratrix was substituted as respondent.

The complaint is in two counts, the only one necessary to be considered being drawn upon the theory that at the time of the injury Burtch was an employee of the company and both were engaged in intrastate commerce. The answer denies the allegations of the complaint and alleges facts to establish that at the time of the injury they were engaged in interstate commerce. The contention, therefore, upon the one hand, was that the case was governed by the State, and upon the other hand, that it was governed by the Federal, Employers' Liability Act. The distinction is material, since certain common law defences abrogated by the former, are still available under the latter.

It is clear that the trial court assumed that the state and not the national law applied and the case was submitted to the jury upon that theory; and this presents the only question which it is necessary for us to consider. The jury returned a verdict in Burtch's favor, the judgment upon which was affirmed by the Supreme Court. 134 N. E. 858.

That the train carrying the cutter came from Louisville, Kentucky, is not disputed; but it is contended that there was no evidence from which it could be determined that the shipment originated there or at any other point outside the State of Indiana; and the jury, in answer to certain interrogatories, so found. These interrogatories and answers are as follows:

"Did said car come in said train from Louisville, Kentucky, to Commiskey?

"Ans. The train came from Louisville. No evidence where car came from.

"Did said cutter come to said Commiskey in said car from Louisville, Kentucky?

"Ans. No evidence."

If, in truth, there be no evidence from which these facts can be found or if the evidence be conflicting, we can, of course, inquire no further. But if, on the contrary, the uncontradicted evidence affirmatively establishes that the shipment originated in Louisville, Kentucky, and thence was carried to Commiskey, Indiana, it was an interstate shipment, and neither the special findings nor the general verdict will preclude us from so holding. Lurton, the consignee, testified that he obtained the cutter "through an Indianapolis concern but it was shipped from a warehouse in Louisville," and that the bill of lading was made out to him from Louisville to Commiskey. Hartwell, a telegraph operator, testified that the freight train came from Louisville and "this cutter was in one of the cars of that train that came from Louisville." This constitutes the entire evidence upon the point and plainly establishes the interstate character of the shipment. But this is not enough. It is necessary to show further that "the employee at the time of the injury [was] engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558.

There is a preliminary dispute as to whether Burtch stood in the relation of employee at the time of the injury, and this we first consider. The testimony shows that Burtch was not regularly employed but that he engaged in this particular work at the request of the train conductor, because it was necessary to unload the cutter and the train crew was unable to do so without help. The evidence tends to show that the conductor, in making the request, followed a long-standing practice to call upon bystanders to assist in unloading heavy freight. These facts, either undisputed or established by the verdict of the jury under appropriate instructions, are ample to sustain the conclusion reached below that there was an exigency which authorized the conductor to employ out-

side assistance and that Burtch, for the time being, occupied the relation of employee to the company. See, for example, *Marks* v. *Railway Co.*, 146 N. Y. 181, 189–190; *Fox* v. *Chicago, St. P. & K. C. Ry. Co.*, 86 Iowa, 368, 373; *Haluptzok* v. *Great Northern Ry. Co.*, 55 Minn. 446, 450; *Maxson* v. *Case Threshing Machine Co.*, 81 Neb. 546, 550; *Aga* v. *Harbach*, 127 Iowa, 144. The train upon arrival at Commiskey drew in upon a sidetrack where the cutter was unloaded and the train then proceeded on its way. It was while assisting in this work that Burtch sustained the injury sued for. It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it, and it follows that the facts fully satisfy the test laid down in the *Shanks Case, supra.*

It appears that Burtch was interested in the cutter as part owner and it is contended that in complying with the request of the conductor he assumed all responsibility because, in doing so, he simply discharged a duty imposed by a rule filed with the Interstate Commerce Commission, requiring owners of heavy freight, under stated circumstances, to unload it. The evidence, however, not only tends to show that conditions requiring compliance with the rule were absent, but the point is immaterial in view of the finding of the jury to the effect that Burtch assisted in the work not as owner but in the capacity of an employee. Observance of the rule in question is required only to prevent discrimination among shippers. It has nothing to do with the interrelations of the carrier and its employees.

Moreover, the failure to enforce the rule, if such there was, constituted no part of the causal sequence of events. Such failure would be merely an attendant circumstance, neither causing nor contributing to cause the injury, which, on the contrary, came about as the result of physi-

cal facts and conditions wholly apart therefrom. If, therefore, a violation of the rule be assumed it would not avail to relieve the company from a liability which would otherwise exist. See *Moran* v. *Dickinson*, 204 Mass. 559, 562; *Newcomb* v. *Boston Protective Department*, 146 Mass. 596; *Currelli* v. *Jackson*, 77 Conn. 115, 122.

Upon the facts now disclosed by the record the case is one arising under and governed by the Federal Employers' Liability Act and in that view it should have been submitted to the jury. The judgment of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.